LAW and the Status of Women in Tanzania

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LAW AND THE STATUS OF WOMEN IN TANZANIA

by

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Abbreviations

LRT:	Law Reports of Tanzania
EALR:	Eastern Africa Law Review
GN:	Government Notice
HCD:	High Court Digest
EACA:	Eastern Africa Court of Appeal
CAUR:	Court of Appeal of the United Republic of Tanzania
LMA:	The Law of Marriage Act

PART ONE

A GENERAL REVIEW OF LAW AND THE STATUS OF WOMEN IN TANZANIA

I. INTRODUCTION

The position of women in any country is a yardstick for measuring the development of that country. It is also a manifestation of the ideological commitment of any government in power. Tanzanian women are faced by many tasks in national development. With the exception of their traditional tasks the new tasks require a revolutionary change in all spheres of life and they require a truly liberated women as a human being. At present Tanzanian women are far from being equal to Tanzanian men.

Women have always been the backbone of the life of mankind, they have born and looked after the young and cultivated and found other means of subsistence on which mankind has thrived; unfortunately woman has been subjugated and oppressed like an animal. It is not possible to liberate women through law alone; changes in our economic base and superstructure are necessary in order to end the dependence and oppression of women by men. I have endeavoured to survey existing legislation and customary laws and to show how these operate towards women. Cases have been cited to affirm my contentions and to show the uncertainty of law in some areas. Finally, I have collected all the recommendations found in the treatise and added a few which I think necessary to achieve a good balance.

II. GENERAL PROBLEMS RELATED TO IMPROVING THE STATUS OF WOMEN THROUGH LEGISLATION

Law, as an instrument of bringing about social change in society, can go a long way to improve the status of women when applied in a concerted effort with other social aspects but there are fundamental restraints which make the realisation of this objective a complicated process. In order to understand what delays a positive development towards improving the status of women through legislation it is important that we examine the impact of certain social factors.

A. POSITIVE ASPECTS

1. Role of Women in the Anti-colonial Struggle and its impact on the Post Independence Position of Women

During the upheavals of the liberation movement of the 1950's and 60's in Tanganyika women played a major role in the anti-colonial struggles. 1/ At the attainment of independence their contribution was never relegated to second place; the new nationalist government recognized their contribution and consequently enabled the founding of the Women's Organisation in 1962 as a wing of the TANU Party whose first General Secretary was a renowned militant during the anti-colonial struggle. This was a clear indication of the position of women and their role in the new nationalist government and the new society in Tanganyika at that time. The government recognised de jure that women were to be treated with dignity and as being equal to any other citizens of the country and following the politico-ideological dictates of the ruling TANU Party the policy of equality was to be the guiding principle in social, political and economic spheres. The further development and role of the Women's Organisation will be discussed below.

B. NEGATIVE ASPECTS

1. The Traditional Position of Women in Society

Some writers assert that, traditionally, women enjoyed some independence and were not oppressed; the contrary is the case. Women in traditional society occupied a subordinate role to that of men and this is illustrated by the fact that a woman, during her lifetime, was always

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1/ Note the role of Mau Mau women constituting 20% of the guerillas and the active role of Frelimo women's wing, (Kenya and Mozambique).

under the control of a particular male. Consequently, the status of womanhood reflected the position of an individual woman with regard to other members of the society and to property. On the basis of this position rules of property ownership and inheritance developed which denied a woman certain rights to property or which gave her very limited rights. The fact that a woman was considered as a chattel to a man meant that he had proprietary interest in her; hence an action could be brought for damages in the case of any interference with the husband's conjugal rights over his wife. We should ask ourselves: was a women's position always subordinate? This controversial issue has raised many conflicting views among scholars. A well summarised and consistent view, based on conclusions drawn from Lewis Morgan's researches on ancient society, is presented by Engels 2/ who asserts that women previously enjoyed greater power and had more of equal rights and respect than in our present times. He contends that the subjugation of women arose through man's greed for private property and that this led to exploitation and oppression.

These views are taken up by the Marxian feminist E. Reed 3/ who expounds on the position and role of primitive women and compares it with that of men. She asserts that women were the experimenters and discoverers of much of that which was used in the homes and was necessary for daily subsistence and sustenance of life, 4/ whereas men were confined to activities like hunting which had never been a dependable source of food. In the same way the present division of labour based on sex roles is still maintained. Women do that work which is necessary throughout the process of production and men do heavy and intermittent work. The same division of labour is also discerned in wage labour employment, as will be seen in the latter part of this work. This total subjugation of women has a negative influence on the legal status of women even though the law tries to alleviate the inequalities. Some of the negative attitudes find their away into the provisions of the law and therefore buttress and perpetuate the inferior status of women.

2. Multifarious Tribes and Complex Customs

In Tanzania a legislator is at once confronted with the problem of striking a balance between the prevailing customs and customary rules. There are over 120 tribal units and of these 80% are patrilineal and the

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2/ F. Engels, The Origin of the Family, Private Property and the State, (London, Lawrence and Wishart, 1975).

3/ E. Reed, Problems of Women's Liberation: A Marxist Approach, (Pathfinder Press, 1970).

4/ Ibid., pp. 23-48.

remaining 20% are matrilineal, with some patriarchal influences. These two social structures influence the economic structure in which they operate. In property relation each structure determines who is entitled to inherit property and from whom that property may be inherited. A legislator has to try to keep the balance by upholding customary values and rules as well as discarding those rules which are repugnant to natural justice.

3. Religion

Problems have arisen in those areas in which Islam has become a religion as well as a custom. The legislator faces a problem in restricting the operation of Islamic Law where an injustice to women might occur. 5/ Christian religion, the harbinger of civilisation, does not pose problems to the legislator as far as marriage laws are concerned although one problem is that the Bible still stresses the inferior position of a woman in relation to the man. 6/ Christianity does not recognise the dissolution of marriage 7/ but this is a personal affair and to date no legal conflict has arisen where a court has seen fit to dissolve a Christian marriage.

4. Legislative Problems

Most of the laws applicable in Tanganyika were imported by the Colonial Administration. 8/ I need not elaborate the underlying reasons for such an action but a few words relevant to the subject matter will suffice. The motivation of colonialism was the seeking of markets and raw materials by the metropolitan countries. England, then very strong and influential, built a global empire around the world and acquired many colonies. Though the primary aim was not direct rule and the consequential assumption of responsibilities nevertheless it was necessary for the colonial power to establish some law and order. Thus the

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5/ Comments on the Government White Paper on Proposals for the Reform of the Law of Marriage, Law of Marriage Act, Series 107, No. 3 (1971), and Rahanji V. Rattansi, Law Reports of Tanzania, No. 55 (1975). Muslims feel that they have been denied a constitutional right by being restricted from practising their religion. A husband's talak has no longer any effect of dissolving a marriage.

6/ Genesis 3: 16 " ... and he shall rule over you"

7/ Matn. 19: 6 " ...what therefore God has joined together, let no man put asunder."

8/ Tanganyika Order-in-Council, 1920, Article 7(2).

instruments of law and order were introduced by degrees into the country. In order to maintain stability and gain the co-operation of the indigenous masses the metropolitan country incorporated some existing indigenous institutions into the Rule of Law. This led to the establishment of parallel systems of courts 9/ and a multiple system of laws. The Native Courts were empowered to apply customary law and to adjudicate over matters governed by customary law only where parties were natives of the country. Thus a body of rules enforced by the state machinery was recognised and administered in the Courts of Law however adverse the effects were on women. 10/ After independe independence, although the dual systems of courts was abolished, 11/ the same rules applied even though the repugnant clause found in the received law was deliberately left out. 12/ On the basis of the legal instruments empowering the application of customary law, the denial of certain rights to women is de jure sanctioned. This attitude adopted by the courts was inherited together with the whole colonial administrative machinery and mentality. The case of Rex V. Amkeyo 13/ in which a wife by a polygamous marriage was not considered to be legally married but only a concubine of Amkeyo, is an example of overt disregard and non-respect towards women. This decision meant that the wife could not enjoy the same privileges as a woman married in a civilised form whilst at the same time, for the purpose of upholding African custom, the law recognises the multiplicity of wives, a choice which is open only to the man. 14/

5. Political Aspirations

Many African statesmen have propagated Prosperity, Equality and Dignity as political catchwords for their campaigns and popularity. These terms are embodied in their principles of African Socialism but too often these principles have overlooked the plight of women who are never considered in terms of development, equality or dignity. 15/ An example of this is Tanzania's Debate on the Law of Marriage Act. 16/ Men were adamant about

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9/ Tanganyika Order in Council 1920, Article 17, established the High Court, Article 22, Subordinate Courts, Article 24, conditions for the Application of Customary Law, Native Courts Ordinance, 1929.

10/ The customary rules of custody of children and property were a gross injustice to women.

11/ Magistrates Courts Act, Cap. 536, 1963.

12/ "Judicature and Application of the Laws of Ordinance of Tanganyika 1961", as amended by the Magistrates Courts Act, Schedule VI, 1963.

13/ East African Law Review, No. 14, 1917.

14/ The Law of Marriage Act 1971 S. 15(3), (1971).

15/ Dignity, respect and prosperity have been and are always a prerogative of male citizens.

16/ Majadiliano ya Bunge, (Hansard 1970).

certain provisions, which were aimed at curtailing their power in marrying more than one wife or in dissolving marriage through an arbitrary repudiation of marriage by talak, would not be passed. One MP even stated that women were meant to serve men and that they can never be equal to men; he was also of the opinion that the law was too radical. In Kenya, a debate on a similar Bill introduced in Parliament caused similar controversies. The law wanted to make adultery an offence but MPs were adamant in declaring that adultery or infidelity was a man's prerogative, whilst on the issue of prohibiting wife beating, one MP was of the view that women ought to be beaten since they were headstrong and disobedient. 17/ As can be seen our brand of African Socialism is nothing other than the ideology of the dominating class and in this case it is male domination and the oppression of women.

In Tanzania the same brand of socialism has been introduced with the objective of building an egalitarian society and when we examine in detail African Socialism or Ujamaa we find that the ideals of mutual respect, common ownership of basic goods, and everyone's obligation to work were based on the material conditions of the pre-colonial societies of Tanganyika. 18/ In each society a certain degree of class differentiation had taken place and there were exploiting and exploited classes in which women were already relegated to the position of the exploited. Mutual respect and common ownership operating on principles of clan organisation determined by patriarchal relations was nothing other than respect and ownership for only certain members of the clan and women were obliged to work on land they did not own, or which they possessed by virtue of their being married to a clan member, or by being daughters of that member of the clan.

By re-introducing the old social relations in changed circumstances contradictions are bound to arise and such contradictions are already surfacing in a number of Ujamaa Villages. The reason for these contradictions is to be found in the problem that the existing social organisation of the village does not correspond to the economic basis of the village. In the old order the means of production and produce was controlled by the male members of the clan and women were seen as productive units producing for that society but with the land reforms the enactment of the Ujamaa and Ujamaa Villages Registration, Designation and Administration Act, 1975, ownership of land was vested in the whole village and not in one individual member. Thus possession and use of land is now dependent upon an individuals membership in the village 19/ or upon

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17/ One MP in Tanzania recommended that the prohibition of wife beating should be removed. He stated that women are never satisfied that their husbands love them unless they are properly beaten.

18/W. Rodney, How Europe Underdeveloped Africa, pp. 56-57.

19/ Sect. 4(1) of the Act states that "... a village will be registered if it has not less than 250 Kayas". Under the interpretation section of the Act a Kaya means a household or a family unit.

residence. 20/ The Act referred to above seems democratic in providing each person with the means of production and in compelling each able-bodied person to work but the machinery of administering the village and the social relations remain male dominated. It is not surprising therefore to find that women are still the majority of workers, even in Ujamaa villages, yet they are still the denied basic rights. Moreover, the Act did not want to change fundamentally the social basis of life for the sake of stability, in which case the position of women remains the same. 21/ In other words new social relations are being established on top of the old social formation. Can equality on the basis of male supremacy become a reality?

6. Education

Most of the women in Tanzania are still illiterate or have acquired only the minimum education either through literacy classes or primary education. It was never considered important to send girls to school owing to the fact that it was considered that their destiny would be marriage, a situation which requires no education. After initial encouragement by missionaries 22/ and considering the monetary benefit an educated daughter brings to the parents, girls began to attend schools although the ratio of girls' schools to boys' schools was very uneven. 23/ Boys had more schools and hence a better chance of education, however. Since independence the government has been trying to remove some of the bottlenecks preventing women from gaining equal access to education. 24/ Despite the reforms in the system of education fewer women are enrolled in institutions of education owing to cultural and economic restraints 25/ and as a result of this women either never go to school or just attend primary education.

Education is very relevant to the advancement of the women's cause where a lack of objective analysis of an individual's problems is a factor which works to the disadvantage of the woman. Despite enacting laws which might safeguard the rights of women, ignorance becomes a hindering factors

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20/ Government Notice 168/75 para. 7(1) ... resident refers to an able-bodied person of or over 18 years ... ordinary resident in the village." Para. 7(2) ..."A resident shall also be entitled to one acre of land."

21/ H. Mapolu Master of Arts dissertation, (1973).
L. Fortman, Women in Agriculture: Women and Tanzanian Agricultural Development, ERB Paper 4, 1977.

22/ Pre-colonial education had its own objectives. The education of women was for helping them to execute their roles in the home as housewives.

23/ In 1960, 1019 girls compared to 2514 boys were enrolled in Form I.

24/ The removal of segregation and discrimination in schools.

25/ M.J. Mbilinyi, The Education of Girls in Tanzania, (Dar es Salaam Institute of Education, 1969).

and of the number of women we have interviewed some have no idea that legal provisions exist to protect them or that they could use a certain machinery to regain or retain their rights.

7. Women's Organisation

The existing national women's organisation (Umaja Wa Wanawake Wa Tanzania, or UWT) has got its own problems, the ramifications of which affect and hinder the realisation of the rights of women in Tanzania. This organ is the only one representative of women and is responsible for promoting their position in Tanzania. Women can effectively channel their grievances and priorities in terms of their prospective plans for development knowing that these points will be heard and attended to, although to date, we cannot say that the UWT has effectively served the interests of women. Characteristically it is an elitist organisation and does not have grass-roots support. Its aspirations have failed to find resonance with the basic issues related to women and as a result women feel alienated from the organisation and show little interest in joining it. 26/.

Despite the difficulties facing UWT 27/ which should be overcome in due course, the UWT itself is faced with administrative and functional problems. The Organisation needs to be restructured and made more functional in order to overcome its present passive or almost dormant state. By functioning properly it will really address itself to women's problems in an appropriate manner and will also be in the position of influencing the legislators and policy makers so that they pay more attention to women's problems than before. As the SIDA report states " ... women's needs and aspirations are best known to the women themselves.' 28/

8. Conclusion

A combination of the above-mentioned problems in any variation raise a number of difficulties in trying through the law, to improve the status of women. By trying to maintain a balance of existing conditions which we know detract from the dignity and respect of women in approaching the

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26/ Source: Data furnished by the SIDA report on Tanzanian Women's Activities and Development Co-operation. The present membership ranges from 180,000 to 250,000 out of a total population of more than 5 million women.

27/ Ibid., p. 15.

28/ Ibid., p. 2.

problem from the periphery and in our present era of integrated development and the establishment of a 'New Economic Order' it is appropriate to approach any women's issues in terms of development. New strategies of development are aimed at harnessing all the available labour resources, especially in the case of an agricultural country like Tanzania whose rural sector is of great economic importance. It is a recognised fact that rural women comprise the backbone of our agricultural economy and that rural women contribute much more to agricultural production than men. It would therefore be appropriate to improve her relegated status and raise her to thelevel of her male counterpart. Exploitation knows no kin nor boundary, nor does it know tradition and despite all bottlenecks the legislator must legislate for the sake of progress. The position of present-day liberation of woman was aptly put by the writer Kovaksky.

"Social progress is impossible without a successful struggle to liberate women from all forms of exploitation and grant them equal rights with men in public life and work and in family relations; this also means placing upon women an equal responsibility with men for the future of their countries and peoples." 29/

Too much emphasis should not be placed on law alone owing to our present experience that a legal enactment does not of itself bring immediate change other social factors necessary for development and change should be mobilised at the same time and conditions for the realisation of the equality of women should exist. For example the role of women in the household has inevitably led her to domestic enslavement. To that effect Lenin stated:

"You all know that even when women have full rights they still remain factually down-trodden because all housework is left to them. In most cases house-work is the most arduous work a woman can do. It is exceptionally petty and does not include anything that would in any way promote the development of the woman." 30/

The establishment of day care centres, the reduction of housework and drudgery and the full participation of women in public production will enable them to be placed on an equal footing with men. Legal equality can only be achieved when individual equality between man and woman has been achieved.

29/ N.A. Kovaksky, ed. Women Today (Moscow, Progress Publishers, 1975'

30/ V.I. Lenin, The Tasks of the Working Women's Movement: Collected Works, Vol. 30, (Moscow, Progress Publishers, 1965), p.43.

III. POLITICAL AND CIVIL RIGHTS AND DUTIES

A. Principles of the Tanzanian Constitution

The basic document guaranteeing all citizens of Tanzania political and civil rights and spelling out their duties is the Constitution of the United Republic of Tanzania, 1977. The Preamble contains the Principles of the Constitution which embody also the political aspirations of the peoples of Tanzania.

PREAMBLE

PRINCIPLES OF THE CONSTITUTION

The aims and objects of the Constitution are to guarantee freedom, justice, fraternity and concords, which are founded in the following principles.

A. That:

(i) all human beings are equal;

(ii) every individual has a right to dignity and respect as a human being;

(iii) every individual has the right to receive from society protection of his life and of property held according to law;

(iv) every citizen has the right to freedom of religious belief, of expression, of movement and of association within the context of law;

(v) by using the lawfully-established forums every citizen has the right to participate effectively in the national decision-making process and in his own decisions;

(vi) every individual has the right to receive a just return for his labour.

B. That Socialism and Self-Reliance is the only way of building a society of free and equal citizens.

C. That it is the duty of every community ...

(i) to respect the dignity of every human being and his other rights;

(ii) to safeguard and implement the Laws of the State;

(iii) to conduct the affairs of the State so that its resources are developed, preserved, and enjoyed for the benefit of its citizens as a whole and so as to prevent the exploitation of one man by another;

(iv) to ensure that in our country every person who is capable of working does work, and work means any lawful activity which enables a person to earn a living;

(v) to consolidate and maintain the inherent dignity of human beings in accordance with the Universal Declaration of Human Rights;

(vi) to ensure that the Government and all State organs give equal opportunity to all citizens, men and women, irrespective of race, tribe, religion, or status;

(vii) to ensure that the country is free from all types of exploitation, intimidation, discrimination, corruption, oppression or favouritism;

(viii) to ensure that the wealth of our nation is used for the development of the people, particularly for the elimination of poverty, ignorance and diseases;

(ix) to ensure that the Government exercises effective control over the principal means of production;

(x) to ensure that the Government follow the Democratic Socialist principles in governing.

D. That it is the duty of every person to believe that work is the measurement of dignity and therefore should put into practice that belief.

E. Whereas such rights are best maintained and protected and such duties are most equitably disposed in a Democratic Society where the Government is responsible to a freely-elected Parliament representative of the people and where the Courts of Law are free and impartial.

1. The right to Vote and be Elected

The Constitution guarantees every Tanzanian the right to vote ...

Article, 4(1), Every citizen of Tanzania who has attained the age of eighteen years shall be entitled to be registered as a voter for the purpose of elections in Tanzania by the people. This right shall be exercised in conformity with the provisions of subsection (2), together with other provisions of this Constitution and the law in force in Tanzania relating to elections.

A person can only be disqualified from voting by an Act of Parliament on the grounds of:

(a) his allegiance to another state;

(b) infirmity of mind;

(c) criminality;

(d) absence or failure to produce evidence of age, citizenship or registration.

It can be seen from the above that a person cannot be disqualified from voting on any other grounds save as provided for by the Law. 1/ After independence the colonial disqualifications based on education and property were removed in order to extend the franchise, these disqualifications affected the men but more so the women, the majority of whom had neither education nor property qualifying them for the voter register.

The present problems impeding and influencing women in voting arise as a result of their traditional position. Traditionally women are not expected to take any initiative and this extends even to their participation in elections. For example, Hyden found that in Bukoba area 20% of the adult villagers, mainly men, attend local elections. 2/

Women usually remain at home doing their various domestic duties whilst it is the men who attend meetings or meet each other in bars and obtain information which they later communicate to women. 3/ Since the women do not receive proper information and are not effectively influenced by the media of communication they do not effectively utilise their right to vote.

Women can stand to be elected either to represent their constituencies or as the President of the United Republic of Tanzania.

Article 26, (1), the following are the qualifications required in order to become a Constituency member, the person must be ...

1/ Constitution of United Republic of Tanzania, Article 4(2), Proviso.

2/ G. Hyden, Buhaya, Selection and Election Processes. In Lionel Cliffe, ed. One Party Democracy. p.61.

3/ G. Hyden, Lionel Cliffe, ed., op.cit., p.250 note the importance of informal means of communication.

(a) a citizen of Tanzania who has attained the age of twenty-one years;

(b) a member of the Party who has complied with membership conditions as provided in the Party Constitution and must have the following leadership qualifications.

Article 6, (3), if the Parliament is dissolved or if any other event mentioned in paragraph (2) occurs during the period when an election of a President is to be held, the National Executive Committee of the Party shall meet and that committee shall nominate a citizen of Tanzania, who has attained the age of thirty years, as the sole Presidential Candidate. The Presidential Candidate nominated shall be presented to the National General Conference of the Party, which, after receiving the proposed name shall meet and consider it for the final nomination of Presidential Candidate. The National Conference of the Party shall meet within fifty days of the dissolution of Parliament or within twenty one days of the occurrence of any other event during the period when an election of a President is to be held.

There has been a noteworthy increase in women standing for elections. In the 1965 Elections there were 16 women candidates, these were reduced to 8 after the final selection. 4/ The views of one writer, who was assessing the general mood regarding women's participation in the election process, were expressed as follows ...

" ... on the basis of the biographical data of all the initial candidates it is possible to make comparisons between those not selected, those selected, and those who eventually won. This data provides some clues as to which personal characteristics (sex, age, education, ethnic or geographical origins, social and economic background, political record), were not preferable to either party members or the voters.

Sex. There were only 16 women candidates, of whom four were incumbent MPs (three of them Junior Ministers), while another two were, or had been, members of the National Executive Committee. This number was only pared down to 8 in the selection process, this is certainly not an indication of any reluctance to select women on the part of TANU. Among those passed over in the process, however, was Mwami (literally, "King") Teresa Ntare (a hereditary ruler of stock and ex-Chief of the Ha in Kasulu District bordering Burundi), who had been Parliamentary Secretary to the Minister for Community Development and National Culture. Her sister, Anna Gwassa, a former Area Commissioner, was defeated in the election for the other Kasulu seat, having been selected by the National

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4/ G. Hyden, Lionel Cliffe, ed., op.cit., p.61.

Executive Committee, although originally placed third by the district conference. She brought a very feminine image to the election, often nursing her small baby on the platform. Four of the eight women selected were returned. Among the four who lost was, surprisingly, Bibi Titi Mohamed, TANU's first women's leader, a Junior Minister and President of the National Women's Movement, known as Umoja wa Wanawake wa Tanzania or UWT. This latter upset has been explained by the fact that she was not really native to her constituency, having been born in Dar es Salaam, and that she had been too busy with UWT, TANU and Government duties to do much fencemending. The suggestion that there was sexual prejudice in the predominantly Moslem constituency in which she stood would seem to be ruled out by the victory in nearby Lindi of Mrs. Matoka, who was in fact a Christian from another district and who was opposed by a well-known local muslim. Similarly, although Mramba was reluctant to vote for a woman in the Kilimanjaro Vunjo seat, Lucy Laneck's decisive victory in the neighbouring Kilimanjaro Central constituency demonstrates that a woman with a strong personality can overcome whatever prejudice may exist, She is now the only woman member of Government."

The 1970 Elections also saw women standing to be elected, some of whom like Lucy Lameck, were veterans who knew the rules of the game and decisively beat their opponents by a wide margin. One writer reviewing the 1970 elections in Kilimanjaro commented on the fact that in two constituencies women candidates decisively defeated their male rivals and that this was "a significant land close mark in the process of women's liberation in Kilimanjaro." 5/ The woman candidate in Arusha, Bi Salome Philemon, was ill-fated owing to the fact that she was fighting against an old veteran who was all out to make a comeback against the prejudices of Meru men and also against the fact that, in the history of Arusha District, she was the first woman contender for high office. The results were 9251 for the woman against 14,899 for the man. The comment of the writer was that ...

" ... the final results support the notion that the rural electorate in Arusha is still wary of having a woman as their National Spokesman." 6/

With due respect I do not wholly support the above submission owing to the fact that the results might have turned out the same even if the challenges had been a man and given the popularity of the other contestant.

The defeat by a woman candidate was a bitter pill for a male contestant was illustrated by the case of Madundo v. Mweshemi 8 A.G. 7/ It is my belief that as more women understand the nature and intricacies

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5/ Socialism and Participation: Tanzania 1970 General Election, p.230 and pp.246-250.

6/ Socialism and Participation: Tanzania 1970 General Election, p.265.

7/ High Court Digest, No. 18, (1972) The male candidate was defeated by an overwhelming majority vote. He asked the court to nullify the results owing to some minor voting irregularities.

of politics then more will come forward to exercise their right to vote and stand for election. For example, in most of the village governments, the representation of women is very minimal and it is difficult for the women to influence the village development plans in their favour. The predominant factor which restrains women from participating at that level is male control and women's illiteracy.

2. The Right to be Appointed

A proportionally small number of women are being appointed to hold various public offices. To date we have one woman Ambassador to Angola, two women Ministers and several women appointed as Area or Regional Commissioners. In most cases all these are Presidential appointments 8/ and operate through a certain legal mechanism indicating that, de jure, there is no discrimination against women in this respect. However, given the small number of women experts in various fields, it is not possible just to appoint women just because they are women. I believe that if the UWT could keep an inventory of women experts working in various disciplines then we could have more women placed in superior appointments.

3. Legal Capacity

Tanzanian women face limited legal disabilities by virtue of their sex. Their legal capacity is governed by general laws applicable to all citizens.

A woman becomes an adult having attained the age of majority, which is 18 years 9/ but before reaching the age of majority she may not make a fully binding contract 10/ and she cannot marry without the consent of a parent or guardian. Section 17 of the Law of Marriage Act, 1971, provides that ...

17(1). A female who has not attained the apparent age of eighteen years shall be required, before marrying, to obtain the consent:

(a) of her father; or

(b) if her father is dead, of her mother; or

8/ By virtue of Articles, 12(1), 13, 14 and 20 of the Constitution. The President is empowered to appoint a Vice President, Minister, Junior Ministers and any other person to offices in the Service of the United Republic. Article 19, The Party Chairman may appoint Regional Commissioners.

9/ The Majority Ordinance, Age of, cap. 431.

10/ The Law of Contract permits a minor to make a contract but the minor cannot be used on the Contract.

(c) if both her father and mother are dead, of the person who is her guardian.

In any other case, or if all the above mentioned persons are dead, she does not require consent. It is also a general principle that on marriage a woman becomes an adult independent of her age. This does not mean, nor is it clear, that she would be permitted to vote if she has not attained the age of 18 years. The purpose of making her an adult on marriage is to facilitate her transition to full married status with the responsibilities involved. She can then contract for her own necessities and those of her children.

In Tanzania marriage does not effect the legal capacity of the woman. Part IV of the Law of Marriage Act, 1971 provides that ...

S.56, A married woman shall have the same right as has a man to acquire, hold and dispose of property, whether movable or immovable, and the same right to contract, the same right to sue and the same liability to be sued in contract or in tort or otherwise.

S.58, Subject to the provisions of Section 59 and to any agreement to the contrary that the parties may make, a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring, holding and disposing of any property.

The few incapacities mentioned in Section 59 are incidental to the state of marriage. This means that neither party may alienate the matrimonial home, where it is owned by one of the parties, whilst the marriage continues. The provision is aimed at protecting either spouse from being evicted from the matrimonial home by the other. This is what is technically termed as Deserted Wife's Equity.

Under customary law the status of the woman is usually that of a minor whereby she is always under the control of a male; either a father, a brother or a husband. 11/ This means that in terms of real property, where this property is communal or clan property, the woman has no capacity to exercise ownership rights over it.

4. Citizenship

On the 9th December 1961, Tanganyika Independence Day, every person who was born in Tanganyika and who was previously a citizen of the United Kingdom and Colonies or a British Protected Person became a citizen of Tanganyika. 12/ The ius sanguinis principle was applied in a case where neither of a person's parents was born in Tanganyika he could not become a

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11/ There is no great difference between matrilineal or patrilineal societies, though the position of a woman is more subordinated and has limited rights in the patrilineal society.

12/ Citizenship Act, S.1(1), 1961.

citizen by virtue of the Citizenship Act, 1961. A person who did not become a citizen in the above-mentioned manner could become a citizen through registration or naturalisation and a person could register if his or her father was a citizen other than by descent. The discrepancy in this case is that the mother's citizenship is of no importance. In the same manner a woman who was or had been married to a person who was or had been a citizen of Tanzania was also entitled to be registered as a citizen upon making an application in the prescribed manner. 13/ It is difficult to understand why a man should not also be entitled to register as a citizen when married to a woman who is a citizen of Tanzania.

13/ Citizenship Act, S.5, 2(2), (3), (4), 1965.

IV. PENAL LAWS

A. Adultery

Adultery has a civil as well as a criminal aspect. Civil proceedings in most cases assume a quasi-criminal nature. Even in matrimonial proceedings adultery was instituted as Criminal Conversion and the standard of proof was so high that it required proof beyond reasonable doubt, as opposed to proof on a balance of probabilities, which is a standard required in a civil case. Even customary law regards adultery as a quasi-criminal offence.

Adultery is not a criminal offence under any known law in Tanzania but it is an incident for divorce in marriage and entails tortious liability, i.e. damages for pecuniary loss and wounded feelings or loss of honour. Previously the action for damages against an adulterer or seducer or enticer could be instituted by a man only against a person who has seduced his wife or daughter. Only recently has it been made possible for women in Tanzania to sue an adulterer and also claim damages. 1/ Two cases of man sueing the paramours of their wives and claiming damages have been cited in the Annexes to this work, Kambuga V. Lugaijamu 2/ and Mwalwange V. Mwalwajo. 3/ In criminal proceedings provocation on the basis of adultery has been pleaded as a defence against a conviction of murder. In Republic V. Apeti, 4/ the accused husband had killed his wife and pleaded that he had caught her commiting adultery. The facts of the case and the surrounding circumstances proved beyond reasonable doubt that the accused was excessively jealous and his defence did not stand. In the case of Fatu Masudi v. Ally Masudi 5/ a single act of adultery by

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1/ The Law of Marriage Act 1971, 5.72(1) A husband or wife may bring a suit for damages aagainst any person with whom his or her spouse has commited adultery.

2/ High Court Digest, No. 19, (1972), Cited in Annex I.

3/ Ibid., No. 78, (1972), Cited in Annex II.

4/ Law Reports of Tanzania, No. 19, (1975).

5/ Law Reports of Tanzania, No. 3, (1975).

the wife was held to be sufficient ground to dissolve a marriage. Adultery is certainly frowned upon by society in so far as it interferes with the stability of marriage and family relations. 6/

B. Sexual Offences against Women

A woman is often regarded as a sex object to gratify man's sexual desire and in this respect woman has often fallen victim to unwanted sexual advances from the male. There are many occasions when force, sometimes fatal, has been used against women by man in his attempt to force himself upon her. There are laws to deal with such offences but as usual the intricacies of law enforcement have proved rather inadequate and a failure in certain instances. As some cases illustrate there is often laxity in dealing with the sexual offences. The courts lack the approach required for such serious cases and what is more, ambiguous technicalities are sometimes applied which result in defeating the purpose of justice. A brief description follows of some of the sexual offences commited against women.

1. Rape

This is a serious offence commited by a man against a woman. It is an offence in which a man uses either force or threats and thereby has unlawful sexual intercourse with a woman or a girl. The essence of rape is lack of any real consent on the part of the woman at the time of intercourse and consent obtained through false misrepresentation is not real consent. It was found in a case where the uncle of a school girl persuaded the girl that sexual intercourse would make her pass her standard VII Examinations that there was no real consent on the part of the girl. In the case of Eliakim s/o Nicholaus v. Republic 7/ the accused had used a knife to subdue a 14 year-old girl and had sexual intercourse with her. He was convicted of rape and sentenced to one year in prison. In Abasi s/o Ramadhani v. Republic 8/ the accused threatened to thrash the complainant with the panga 9/ he was carrying if she refused his demands for sexual intercourse. The accused was convicted of rape and sentenced to imprisonment for two years and twelve strokes of corporal punishment. The two cases above illustrate instances where consent is forced by fear.

6/ T. Huaraka, The Law of Torts, Tanzania Cases, Materials and Comments, p.289.

7/ High Court Digest, No.231, (1969).

8/ Ibid., No.226, (1969).

9/ A matchet.

The Court of Appeal for Eastern Africa made the following comments with regard to consent in the case of Mulira v. Republic. 10/

"It is an essential element in the crime of rape that the woman should not be a consenting party at the time when the incriminating act is done; if she resists at first but then consents, there is no rape (unless her consent is forced by fear or duress). There was no rape in the case of the woman of whom Byron in Don Juan wrote ...

'A little she strove, and much repented,
And whispering, I will ne'er consent, consented.'

In proving rape it is necessary to prove penetration or partial penetration by the male organ into the vagina, thus in the case of Andrea Mgasa Magoiga v. Republic 11/ the complainant, a girl of 14 years, was examined by a Medical Assistant ..." The Medical Assistant first inserted his first finger in the vagina and it easily entered /sic/. He then detected milky discharge therein. On examination he found that the discharge contained spermatozoa of a man. 12/ Although this was a case of defilement the same evidence might be valid for rape. Where a man has unlawful sexual intercourse with a girl under the age of 14 this amounts to rape owing to lack of consent since in law a minor has no capacity to consent. Any act short of the above standard of rape is not rape but attempted rape or even indecent assault. In a case of attempted rape it is not enough that the accused prepared himself to commit rape. It is for the prosecution to prove an intention to have intercourse with the woman, notwithstanding any resistance on her part. This is necessary because Criminal Law places the burden of proof on the prosectuion. The case of Republic v. Andrew Evarity 13/ tried to bring some order to the the chaos and quagmire that the courts had put themselves into. Judge Mfalila was looking at the question of law, social reality and the fallacy of the law and law enforcement machinery. He was looking at the Law from the aspect of woman and society and he was questioning the moral justification of society and natural justice, which was being flouted through the technicalities of the law. Women were also voicing grievances at such injustices, which not only degrade women but question the very moral fabric of society. Why should the Law give so much protection to rapists, whether they have executed their intentions or are just preparing to do so? Let us now consider the case mentioned above and issues raised in that case. The accused, Andrew Evarity, was convicted on his own plea of guilty to the offence of attempted rape, contrary to section 132 of the

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10/ Eastern Africa Court of Appeal, No.223.

11/ Law Reports of Tanzania, No.29, (1976).

12/ Ibid., p.110.

13/ Ibid., No.92, (1973).

Penal Code, 14/ and was sentenced to 9 months imprisonment. The accused had attempted to rape a woman who then shouted for help and owing to the response for help the accused failed to rape her and fled When he was apprehended and brought to court he admitted to having had an intention to rape the woman. The Senior State Attorney submitted for the defence that since the accused had not started to undress then this amounted only to preparation and that therefore he could not be said to have committed the offence of attempted rape. The cases of Omari v. Republic, 15/ Republic v. Haruna Ibrahim, 16/ and Gamaiyo Maku v. Republic 17/ were cited as authorities to support the contention of the defence.

In the case of Omari v. Republic the accused grabbed the complainant and threw her down, tore her underclothes and laid on top of her. The complainant stated however, that he did not unbutton his trousers in preparation for penetrating her private parts. He was convicted of indecent assault contrary to section 135(1) of the Penal Code.

In the case of Republic v. Haruna Ibrahim the accused was convicted of attempted rape contrary to section 132 of the Penal Code. The evidence was that he had dragged the complainant to a ditch, placed his hand over her mouth and pulled down her underclothes while lying on her, when observed by a passerby he fled. It was held that the actions of the accused did not constitute attempted rape since he had not yet undressed but that his actions were only preparation for the crime. This did, however, constitute the crime of indecent assault.

In the case of Gamiyo Maku v. Republic the accused threw down the complainant, threatened her with a knife and tore off her underclothes but she caught him by his private parts and prevented him from unbuttoning his trousers. It was held that the actions of the accused did not constitute attempted rape. The ruling in the above cases is that where the would-be rapist has not unbuttoned his trousers, the stage has not been reached where he can be convicted of attempted rape. To constitute attempted rape there must be evidence of an attempt to have sexual connection with a woman, notwithstanding her resistance. The rule which has evolved with the common law principles is the Pants Down rule whereby if the accused has not taken off his trousers then clearly his intention to rape has not been manifested.

The foregoing cases have illustrated the humiliating and barbarous acts women are subjected to although these acts seem to have no end owing

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14/ Penal Code of Tanganyika, Cap. 16.

15/ High Court Digest, No.362, (1971).

16/ Ibid., No.76, (1967).

17/ Ibid., No.228, (1968).

to the inefficiency and ineffectiveness of the law and legal machinery. Judge Mfalila gave an Obiter 18/ in the case of Republic v. Haruna Ibrahim which outlines some of the perplexing complexities of our legal system.

> "... what is more, for any legal system to be effective its concepts of rights and wrongs must not be too divorced from the expectation of the ordinary member of the society in which it operates. An ordinary member of our society would unhesitatingly say that the accused Haruna Ibrahim was guilty of an attempted rape. He will say that having dragged the complainant to a ditch, placed his hand over her mouth and pulled down her underclothes while lying on top of her but stopped short and fled when he was observed, the accused has really attempted rape. This hypothetical member of our society can therefore be forgiven if he shakes his head in bewilderment when told that the courts think otherwise, that Haruna was not guilty of attempted rape, that at the highest he was guilty of indecent assault because all he had done was mere preparation not proximate enough to the actual act. The complainant can also be forgiven if she left the court bewildered, for as far as she is concerned the accused Haruna had attempted to rape her and she had testified to specific overt acts."

There are many questions that require clarification, for instance, suppose the rapist does not penetrate the female organ with the male organ but gratifies his sexual desires by other means? These questions point more or less to one thing; is it really immaterial whether certain elements of the offence are complied with or not because the major offence which should cover these factors is a sexual offence against women where the classification is not relevant?

One further point on the difficulties of proving rape and other related offences is the need to corroborate evidence. In many cases, where the evidence of proof of rape could not be corroborated, convictions have been quashed. The ratio in the case of Abasi s/o Ramadhani v. Republic 19/ cited above, was that it was necessary to corroborate the evidence of sexual offence otherwise the case may have been quashed and judgement set aside. The same principle was upheld in the case of Andrea Mgasa Magoiga v. Republic 20/ where the prosection failed to establish whether sexual intercourse had taken place with the accused. The court held that whilst it is not a Rule of Law that an accused charged with rape cannot be convicted on the uncorroborated evidence of the prosecutrix, it has long

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18/ Law Reports of Tanzania, No.92, (1973), p.400.

19/ High Court Digest, No.226, (1969).

20/ Law Reports of Tanzania, No.29, (1976).

been the practice of the court to look for the required corroboration in sexual offences. In this case the accused was convicted of defiling a minor by the trial court but was acquited on appeal.

The lack of seriousness of courts, especially those exercising final appellate jurisdiction is evidenced by the lenient sentences imposed on offenders, for instance a trial court imposed a three year sentence of imprisonment and ten strokes on the accused in the case of Republic v. Hassani s/o Masipu 21/ on the grounds that the victim in this case was a married woman. The appeal court reduced the sentence and held that the fact that the victim of rape was a married woman does not in itself warrant the imposition of a more severe sentence than if she were a spinster. The main considerations of the magistrates were the feelings of a married woman and her humiliation in having to testify to what happened to her. The appellate court reduced the sentence of the accused with a comment that such a sentence was excessive where the accused was a young man of previous good character. The magistrates relied on the case of Eliakim s/o Nicholaus v. Republic 22/ where the accused subdued a young girl with a knife and ravished her. Judge Platt considered the previously unblemished record of the rapist to be a mitigating circumstance and reduced the sentence. In the case of Republic v. Shabani s/o Nulungo, 23/ Judge Kwikika released the accused, who had already spent five months of his one-year sentence in prison, on the grounds that his offence of attempted rape was unaggravated. The above examples indicate that the law and the machinery of law enforcement is not serious enough in dealing with sexual offences. Women, as sex symbols, still continue to be molested in one way or the other and finally the trial courts humiliate them more by demanding a high standard of proof in cases before the court. The law needs to be reformed in this respect in order to conform to new social values and political aspirations. The provisions relating to the offences of rape are ...

S. 130 Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of a felony termed rape.

S. 131 Any person who commits the offence of rape is liable to be punished with imprisonment for life with or without corporal punishment.

21/ Law Report of Tanzania, No. 70 (1973).

22/ High Court Digest, loc.cit.

23/ Law Reports of Tanzania, No.94, (1973).

S. 132 Any person who attempts to commit rape is guilty of felony, and is liable to imprisonment for life, with or without corporal punishment.

2. Defilement

S.136(1) Any person who carnally knows any girls under the age of fourteen years is guilty of a felony, and is liable to imprisonment for life, with or without corporal punishment.

(2) Any person who attempts to have carnal knowledge of any girl under the age of fourteen years is guilty of a felony, and is liable to imprisonment for fourteen years, with or without corporal punishment:

Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of fourteen years.

S.137 Any person who, knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her in circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, is guilty of a felony, and is liable to imprisonment for fourteen years, with or without corporal punishment.

Defilement can be an alternative verdict for rape if the evidence warrants, therefore the basic elements of the offence of rape are applicable, though consent is vitiated by the fact that the victim is a minor. Collingwood 24/ states that consent to a charge of defilement is no defence as the law is concerned to protect the virginity of girls under the prescribed age. I would decidedly disagree with him in this respect by saying that there is a moral aspect of criminal law and this permates those provisions dealing with conduct likely to cause moral harm to society. In cases of defilement the law is more concerned with protecting young girls from being morally abused and corrupted and it is immaterial whether that girl is a virgin or not. In cases of defilement age must be proved whether by document such as a birth certificate, or otherwise. Cases of defilement face the same limitation as I have tried to elaborate for cases of rape above and below and I have cited some cases of defilement reported in the law reports in order to outline such limitations.

In the case of Bakililei v. Republic 25/ the accused was convicted of defiling a young girl aged 9 years. The main witness was another 9

24/ J.J.R. Collingwood, Criminal Law of East and Central Africa, p.123.

25/ High Court Digest, No.303, (1971).

year old girl. The issue which arose was whether Judge El-Kindy, the trial magistrate, did not err in the law of evidence which requires corroboration of evidence given by a minor. The Magistrate directed himself on the authority of the East Africa Court of Appeal that corroboration, as a matter of law, is not needed where a child gives evidence on oath but that, as a matter of practice such corroboration is required unless the trial court properly warns itself of the danger of convicting a person on such evidence. In the case of Republic v. Elingle, 26/ the accused was acquitted for lack of corroboration when he was charged with defiling a girl of under 12 years. This ruling, which was established by Judge Georges in the case of Republic v. Jairi Mwaipopo 27/ is that corroboration is independent evidence connecting the accused person with the offence. The same principle was applied in the Elinaje case and the accused was acquitted.

3. Indecent Assault

S.135(1) Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony, and is liable to imprisonment for fourteen years.

(2) Where a charge of indecent assault under this section relates to a girl under the age of twelve years, it shall be no defence to such a charge that she consented to the act of indecency.

Provided that it shall be a sufficient defence to any such charge if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe and did believe that the girl was of or above the age of twelve years.

Collingwood stated that, "An indecent assault is an assault accompanied by circumstances of decency." 28/ Mere invitation by a man to a young girl does not amount to an assault unless the invitation is no defence to a charge for an indecent assault if it related to a girl under the age of twelve years.

The following cases illustrate acts which constitute indecency. In Chole v. Republic 29/ the accused was charged with the attempted defilement of a girl under twelve years contrary to section 132(2) of the

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26/ High Court Digest, No.357, (1971).

27/ High Court Digest, No.300, (1968).

28/ J.J.R. Collingwood, op. cit., p.125

29/ High Court Digest, No.301, (1971) and Isidori s/o Caspar v. Republic, High Court Digest, No.257, (1968).

Penal Code. On the examination of the facts of the case and the circumstances of the act the accused was convicted of indecent assault. According to the facts of the case the accused had laid the girl on the ground with her face upwards. He was found unbuttoning the girl's dress and had already unbuttoned his trousers, he had also lifted the girl's legs upwards. According to the judge these circumstances not only left no reasonable doubt in his mind that the appellant intended to have sexual intercourse with the girl but that his conduct was most indecent. He held that in law the holding of the girls's legs in that manner and undressing her amounted to an assault and that in the circumstances the assault was indecent.

4. Other Offences against Women

(a) Insulting the Modesty of a Woman

S.135(3) A person is guilty of a misdemeanor, who utters any word, makes any sound or gesture, or exhibits any objects, intending that such word or sound shall be heard, or that such gesture or objects shall be seen by such woman, or intrudes upon the privacy of such woman.

Very few cases are taken to courts for the above misdemeanors. This is a laxity on the part of the women as they have learned to acquiesce in the case of such insults.

(b) Abduction

S.133 Any person who with intent to marry or carnally know a woman of any age, or to cause her to be married or carnally known by any other person, takes her away, or detains her, against her will, is guilty of felony, and is liable to imprisonment for seven years.

In certain tribes, such as the Haya, there is a recognised form of marriage known as kulehya, where a girl is abducted and married to the man. This form of marriage, as a customary marriage, was valid before the enactment of the Marriage Act. 30/

S.134 Any person who unlawfully takes an unmarried girl under the age of sixteen years out of the custody or protection of her father or mother or other person having the lawful care or charge of her, and against the will of such father or mother or other person, is guilty of a misdemeanor.

This provision aims at the protection of unmarried girls who are under the age of sixteen years from being taken away from the custody of their guardian against the will of the guardian. 31/ It is a condition of law that the taking of such girls has been against the will of the guardian.

30/ The Law of Marriage Act 1971, Act No 5.

31/ Republic v. Baranzina High Court Digest, No.128, (1971), p.90.

5. Prostitution

Prostitution is a social stigma associated mostly with women and it is a phenomenon which arose out of social relations and is still with us. Most writers and researchers associate prostitution with marriage and assert that unequal marriage and social relations led to this trend. The inferior position of the woman and her position vis a vis the man were, and still are, an acute contradiction in society. Public oppression and indignity reproduce themselves in the family. Sheila Rowbotham writing on women's oppression in Tsarist Russia describes the life of a peasant woman ...

> "In peasant families it was customary for the bride's father to give the groom a new whip so he could exercise his authority if he wished. It hung over the marriage bed and was eloquent of the way in which the young girl passed from the control of her father to the control of her husband. Tsarist Family Law declared the wife's duty was 'to obey her husband as the head of the family, to be loving and respectful, to be submissive in every respect and show him every compliance and affection.'" 32/

Swantz's research findings on prostitution in Bukoba affirm the view that contradictions within the family, deriving from social contradiction, are a cause of prostitution. The Haya who reside in Bukoba were already feudal at the coming of colonialism. Within this feudal society women occupied the lowest social rung and were under harsh subjection by their husbands. Whenever the contradictions became acute women would normally run away from their husbands to the towns to practice prostitution. Swantz noted that it was normally the married women who practiced prostitution. Different forms of marriage and especially the imposition of monogamy are catalysts in this process. Monogamy, when it became a rule, was and is monogamy for the women only. She becomes wholly subjected to the will and authority of one man who guards her possessively and jealously although he enjoys great sexual freedom. The English poet Shelley in his Notes on Queen Mab, cited in Rowbotham, comments that,

> "... Prostitution is the legitimate offspring of marriage and its accompanying errors ... has a woman obeyed the impulse of unerring nature: so society declares war upon her, pitiless and eternal war. She must be tamed slave, she must make no reprisals; theirs is the right of persecution, hers the duty of endurance. Soceity avenges herself on the criminals of her own creation." 33/

The foregoing illustrates how unequal marriage relations drive women to a vice such as prostitution. Considering also the status of women in society it is not possible for them to break the bonds of matrimony and

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32/ S. Rowbotham, Women, Resistance and Revolution, (Penguin, 1974), p.138.

33/ S. Rowbotham, op.cit., p.37.

expect to go back to their parents and be warmly received, therefore the only course left to them is prostitution. Economic motives drive a woman to prostitution especially in a society where all the means of production are controlled by male members, a woman has no claim to anything except in being attached to a man. On the same matter Simone de Beauvoir 34/ asserts that causes of prostitution are misery, unemployment and low wages. This may be a valid statement for urban dwellers but in peasant societies the situation is different. In these societies, as Bader noted in Bukoba District, 35/ women are denied rights of inheriting land which belongs to the clan. Even if they wanted to purchase land elsewhere, in most cases they have no money to do so.

As society develops and new elements arise, social relations take on a different character. Urbanisation and industrialisation have changed the character of prostitution so that it becomes clearly motivated by economic conditions, particularly among those with low incomes. There is also a moral consideration when it comes to prostituion and there are two sides to this issue; one that society is morally responsible for victims of this vice because society has created the conditions for it and two, that such vices reflect the morality of society. Should society tolerate the existence of such conduct? The Wolfenden Committee 36/ was faced with a similar problem on how much the law should interfere in immoral practices. There were some views that since morality was not a sphere of the law then the law should only interfere when immoral practices threaten to corrupt the morals of society whilst others held that in sexual matters women usually tend to be victimised and that the law should protect them. Owing to the technical difficulties involved in sexual offences, prostitution per se is not an offence and it becomes a punishable offence only if a person lives wholly or partly on the proceeds of prostitution. The law refrains from giving the definition of a prostitute. It is likewise an offence to keep houses or brothels for the purpose of immoral acts, to procure or solicit or detain for immoral purposes but in our Law Reports there are no reported cases of prostitution.

34/ Simone de Beauvoir, The Second Sex, (Penguin, 1972), p.570.

35/ Z. Bader, Women, Production and Property: A Case Study of Bukoba District. Swantz also noted that the money obtained from prostitution would be utilised for buying land, building a house and for paying schooling expenses for children.

36/ Wolfender Committee Report on Homosexual Offences and Prostitution. Cmnd. 247 para.257.

V. FAMILY LAWS

Marriage, family relations and incidents deriving from marriage are governed by Act No. 5 of the Law of Marriage Act, 1971. Prior to the passing of the Law of Marriage Act there were different laws governing various customary and religious communities. In addition there was also the general law of the land which did not purport to govern any community. This was the Colonial Marriage and Matrimonial Casuses Ordinance, Caps. 109, 111, 274, 275 and 364, based on English Law. The Law of Marriage Act was enacted with all these regimes of laws in mind and it is not surprising to find that certain elements of those laws are contained in the Act. Fortunately the conflict of laws which would have arisen as a matter of course were timely avoided by amending the Judicature and Application of Laws Ordinance as a consequence of the Law of Marriage Act as follows:

Cap. 453 S.(3A) Notwithstanding the provisions of this Act the rules of customary law and Islamic Law shall not apply in regard to any matter provided for in the Law of Marriage Act, 1971.

Law of the Marriage Act is applauded as a piece of legislation which unified the different laws governing different communities and at the same time managed to raise the status of women in marriage and it is also a great achievement that the Act has been able to establish a uniform system of contracting and dissolving marriages 1/ whilst bringing about much security to customary and Islamic marriages which could previously be dissolved at the will of the husband. The Law of Marriage Act also provides that ...

S.12 A marriage, whether contracted in Tanganyika or elsewhere, shall for all purposes of the law of Tanganyika subsist until determined:

(a) by the death of either party thereto;

(b) by a decree declaring that the death of either party thereto is presumed;

(c) by a decree of annulment;

(d) by a decree of divorce; or

1/ The Law of Marriage Act 1971, Part II.

(e) by an extra-judicial divorce outside Tanganyika which is recognised in Tanganyika under the provisions of Section 92.

The provision of the Act, especially those dealing with contracting and dissolution of marriage apply generally to men and women. It is therefore essential that either party should have the capacity to marry and should have consented to the marriage so that there should be no doubt that the marriage was validly contracted.

The Act introduced new elements into social life which were alien to customary law such as the equality of spouses, which extends to matrimonial property acquired through joint efforts; the prohibitions of corporal punishment by either spouse to the other and the fact that a wife can also claim damages for the adultery of her husband. In the process of social adjustment it is not rare to find certain injustices practiced against women. Such problems arise owing to the fact that a judge has to try to interpret the law and try to apply it to the facts of the case, he does not operate in the vacuum but has to operate in a society in which he is also a part. Therefore where a statute is passed with the intention of trying to bring about social changes, judges seem to be rather cautious about changing their outdated attitudes and thus tend to restrict the operation of the law. This is not a rare phenomenon, the present legislation on employment has gone through a similar process in order to arrive at the present situation. Let us examine the provisions relating to the incidences of marriage.

A. Definition of Marriage

A marriage under the Marriage Act is defined as a voluntary union of a man and a woman intended to last for their joint lives. It is essential therefore that any union purporting to be marriage must be voluntary. The essence of voluntariness is consent given by each party to the intended marriage. In order that a marriage is recognised as lawful it must be a union between a man and a woman. Therefore where a marriage is of the two same sexes, then it is not a lawful marriage recognised by the Act. In northern Tanzania among the Kuria a woman can marry another woman but this type of marriage is not recognised by the law. Where a marriage is of a monogamous nature it is defined as a union between one man and one woman, to the exclusion of all others. A polygamous marriage is defined as a union in which the husband may during the subsistence of the marriage be married to or marry another woman or women.

Essentially there are two types of marriages, namely monogamous and polygamous. All marriages contracted in Islamic form or according to the rites recognised by customary law in Tanganyika, are presumed to be polygamous or potentially polygamous, any marriage contracted otherwise is presumed to be monogamous. 2/

2/ Law of Marriage Act, 1971 s.9(b), S.16(1), S.9(2), S.9(3), S.10(10) (1971), for points raised under definition of marriage.

B. Forms of Marriages

According to the law "form" means the mode of celebration which also determines the type of marriage and its incidences. A marriage can therefore be contracted in Islamic form or in accordance with the rites of any specified religion or in accordance with the customary law rites or in civil form. Section 25(1) of the Law of Marraige Act stipulates that:

S.25(1) A marriage may, subject to the provisions of this Act, be contracted in Tanganyika:

(a) in civil form; or

(b) in civil form or where both the parties belong to a specified religion, according to the rights of that religion; or

(c) if the intended husband is a Muslim, in civil form or in Islamic form; or

(d) where the parties belong to a community or to communities which follow customary law;

Before the passing of the Act much debate arose especially on the issue of polygamy. Reading through the Hansard of March 1970 most women Members of Parliament spoke against polygamy raising such issues as economic misery and jealousies. The counter arguments put up by male members clearly showed male chauvinism and arrogance. MP Mzindakaya alleged that polygamy is good for it tames the first wife who might be becoming uncontrolable and proud. "If you marry a co-wife she will be too busy to be proud and will simply concentrate on thinking out ways of pleasing her husband" he said. Arthur Phillips wrote on the same issue and declared that polygamy ".. reflects, and at the same time intensifies, the fundamental inequality between the sexes which appears to be typical of African societies, ... it can hardly be denied that the institution of polygamy is normally associated with a social system in which there is unchallenged male dominance." 3/

Our law also permits customary law the operation of which is mainly curtailed by the provisions of the Laws of Marriage Act. At present the civil law does not penetrate completely to the daily lives of the spouses whose lives and conduct are determined by age and old customs which, to a large extent, place the man in a higher position than the woman. The assertions of a certain writer on customary marriages are valid even for other marriages and their conditions in Tanzania. He says:

"... it must be stated however, that wives under customary marriages suffer much at the hands of their husbands. They are pillars of patience. They have to be. There, certainly, is no equality of treatment. A husband,

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3/ A. Phillips, ed., A Survey of African Marriage, (Oxford University Press, 1953), p.14.

for example considers himself entitled, and society under native law and custom gives him a backing, to be unfaithful to the wife as wife dares not be unfaithful to her husband. Whereas society would sternly rebuke her for such an aberration, the same society would consider her unreasonable if she made much fuss about her husband meeting another woman sexually. It is unequal combat based upon an unequal status rooted in our society and stretching back to the primordial days of our ancestors." 4/

C. Validy of Marriage

For a marriage to be recognised as valid it has to comply with the basic conditions of the marriage contract. The first condition is capacity to contract a marriage, and second is observance of the necessary formalities.

1. Capacity to Marry. In order that a woman domiciled in Tanzania should have capacity to contract a valid marriage, the following conditions must be satisfied:

(i) she must be over the age of 15;

(ii) she must not be already married;

(iii) she must not be related within the prohibited degrees of consanguinity or affinity.

2. Age. The Marriage Act established a minimum age of marriage at fifteen years for the girl with the consent of her parents or 14 years with leave of court.

S.13(1) No person shall marry who, being female, has not attained the apparent age of fifteen.

(2) Notwithstanding the provisions of subsection (1), the court shall, in its discretion, have power, on application, to give leave for a marriage where the parties are, or either of them is, below the ages prescribed in subsection (1) if,

(a) each party has attained the age of fourteen years; and

(b) the court is satisfied that there are special circumstances which make the proposed marriage desirable.

We all know of the notorious child betrothals and marriages in African societies. The law has tried to amend this by establishing the minimum age of marriage and this is advantageous for women since it will enable them to acquire the basic education provided for in the Education

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4/ Proceedings of the Workshop on African Indigenous Laws, Institute of African Studies, University of Nigeria, (1974), p.109.

Act, 1978. It is also the case that the older a girl is the more she is in a position to resist the domination of the husband, nevertheless young girls might be compelled to marry men much older than they are and this is another ground for inequality. It would have been desirable to set a limit on age differences. The same problems existed in England. A marriage contracted when either party was below the prescribed age could be avoided at the option of either party at puberty. The law for raising the age of marriage is very recent. Child marriages are undesirable and bad. In the words of Judge Pearce

> "According to modern thought it is considered socially and morally wrong that persons of an age, at which we now believe them to be immature and provide for their education (sic) should have the stressed, responsibilities and sexual freedom of marriage and the physical strain of child birth. Child marriages by common consent are believed to be bad for the participants and bad for the institution of marriage.' 5/

The law regards these marriages as void ab initio owing to an invalidating condition precedent. Section 38 provides that,

S.38(1) A ceremony purporting to be a marriage shall be a nullity:

(a) save where leave has been granted under subsection (2) of section 13, if either party thereto is below the minimum age for marriages.

Circumstances which might satisfy the court to grant leave for contracting a marriage at the age of 14 are in most cases pregnancy. The court will invariably be moved to grant leave for the sake of the welfare of the child and the mother. In the matter of an Application for Permission to Marry on the part of Shabir Abdulmalk Mohamed Virji to Dilara Nurally Manji 6/Judge El-Kindy granted leave to a boy of 16 to marry a girl of 18 years. In this case the boy and the girl loved each other and in the course of their intimate relationship they had sexual intercourse which resulted in a pregnancy. They both wanted to marry and the judge considered that in the circumstances it would be undesirable for the child to be born out of wedlock and it would be injurious to the parties and their parents.

3. Monogamy. The issue of monogamy was raised in the foregoing part of this treatise. I would like to stress the fact that whatever form of marriage is contracted in civilised society, it is very restrictive in that a woman is restricted to monogamy only. It is immaterial whether she is married polygamously because the law permits her to have marital relations only with one man. Section 15(3) Act the Law of Marriage Act prohibits a woman who is married to contract another marriage while the first marriage subsists. In reality even a man who has contracted a monogamous marriage has the choice of keeping another woman as his concubine and many men have avoided the provisions of the law in that manner.

5/ Pugh v. Pugh. (1951) 2 All E.R., 680, 687.

6/ High Court Digest, No.407, (1971).

4. Prohibited Degrees. A marriage contracted with a party within prohibited degrees of consanguinity and affinity is also void. According to the Marriage Act marriages between cousins are lawful because they are not within prohibited degrees of relationship. In the case of Fatu M. Masudi v. Ally R. Masudi 7/ the Primary Court found that the parties were within prohibited degrees of relationship, in terms of section 14(1) of the Law of Marriage Act. The parties were a man and his niece. The Appellate Court found on evidence that the parties were cousins and that such a relationship did not fall within those prohibited relationships under Section 14 of the Marriage Act.

In certain tribes it is a custom that maternal cousins marry. Schapera found such a practice in Botswana, among the Kgatla, with whom there was a saying to the effect that, "side by side with his cousin a man is always happy." 8/

Owing to lack of social insurance levirate marriages are another form of marriage prevalent in African societies. In certain tribes if a husband dies a widow is usually inherited by a member of the clan. Among the Nyakyusa the elder son has to inherit the widows of his father, excepting his own mother. The status of widows, before the enactment of the Law of Marriage Act, 1971, was regulated by Customary Law (Declaration), Order GN.279, 1963. Now the provisions of the Marriage Act apply and the widow is more or less emancipated. 9/ A person can no longer inherit the widows of his relative owing to prohibited degrees of affinity. In the case of Mwampope Mwaitenda v. Lazaro Mwakanjuki 10/, the parties were contesting the right of inheriting a widow and the court held that notwithstanding the recognition of Customary Marriage by section 25(d) of the Law of Marriage Act, widow inheritance is not lawful under section 14(3) of the Act. Widow inheritance can only be recognised if it took place before 1.5.1971 and the Law of prohibited degrees of marriage provides that ...

S.14(1) No person shall marry his or her grandparent, parent, child or grandchild, sister or brother, great aunt or great uncle, aunt or uncle, niece or nephew, as the case may be.

(2) No person shall marry the grandparent or parent, child or grandchild of his or her spouse or former spouse,

(3) No person shall marry the former spouse of his or her grandparent or parent, child or grandchild,

(4) No person shall marry a person whom he or she has adopted or by whom he or she was adopted,

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7/ Law Reports of Tanzania, No.3, (1977).

8/ I. Schapera, Married life in an African Tribe, (Pelican, 1971), p.35.

9/ Law of Marriage Act, 1971, s.68.

10/ Law Reports of Tanzania, No.60, (1976).

(5) For the purpose of this section, relationship of the half blood shall be as much an impediment as relationship of the full blood and it be immaterial whether a person was born legitimate or illegitimate.

D. Observance of Formalities

The validity of marriage could be questioned if necessary formalities were not observed or complied with. Under the Laws of Marriage Act the following formalities ware necessary for contracting a valid marriage.

1. Notice of Intention to Marry. It states in the Law of Marriage Act 1971, that,

S.18(1) Subject to the provisions of section 23, where a man and a woman desire to marry, they shall, at least twenty-one days before the day when they propose to marry, give notice of their intention to a registrar or a registration officer.

The purpose of giving notice of intention to marry, 21 days before the actual date of marriage, is to enable the registrar and any other party to check that the parties do not have a legal impediment. The particulars required in the notice are quite elaborate and, interestingly, there is one which requires the parties to state whether their marriage is intended to be monogamous or polygamous. 11/ The registrar, on receiving the notice is required to make it locally known through such means as may be prescribed. 12/ Where a notice of objection is given the Registrar 13/ has to transmit it to the appropriate office for investigation. 14/ In a polygamous marriage a wife may give notice of objection to the intended marriage on the grounds of the economic hardship which might be incurred or on the grounds of the notorious character or an infectious disease that the intended further wife has. 15/

2. Contracting a Marriage. Where there is no impediment a marriage has to be celebrated in accordance with the law. Every marriage, as stipulated in section 25, has to be contracted in the presence of two witnesses. The format for contracting a civil form of marriage is laid down in section 29 of the Law of Marriage Act.

S.29 A marriage may be contracted in civil form in the presence of the district registrar in his office or in such other place as may have been authorised by licence issued under section 31, in the manner following,

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11/ Law of Marriage Act 1971, S.18(f).

12/ Ibid., S.19.

13/ Law of Marriage Act 1971, S.20.

14/ Ibid., S.21.

15/ Ibid., S.20,(2a,b,).

(a) the intended husband shall say to the intended wife words to the following effect either in English or Kiswahili, I, (giving his name), take you, (giving her name), to be my wife, and the intended wife shall say to the intended husband words to the following effect either in English or Kiswahili, I, (giving her name), take you, (giving his name), to be my husband.

As can be discerned there are no platitudes of servility and humbleness on the part of the woman. The parties take each other as equal partners.

Where a marriage has been contracted in the presence of a registrar or licenced person, the same shall forthwith complete in duplicate a marriage certificate, sign it and cause it to be signed by both parties and by two witnesses to the marriage. The parties will retain one copy.

3. Registration. Every Registrar is required to maintain a register of marriages. Licenced Ministers of Religion can maintain a register to be kept in a place of worship. 16/ The Registrars and Ministers are required to register marriages forthwith after celebrations. 17/ A marriage which has been contracted according to Customary Law in the absence of a registration officer shall be registered by the Registrar or registration officer on application from the parties within thirty days after the marriage. 18/ Failure to register a marriage does not invalidate it. 19/ In the case of Anamaria Kasiani v. Clement Nyamagali 20/ the parties contracted their marriage at Ngara in West Lake Region on 25.12.1972. The Marriage Certificate was issued by the Registrar of Marriages in Dar es Salaam on 13.7.1973. The registration was unduly delayed and no reasons were given for registering the marriage in Dar es Salaam. Should the marriage have been impeached for want of validity? Fortunately the irregularity in the registration is alleviated under section 41(f) of the Law of Marriage Act which stipulates that ...

S.41 A marriage which in all other respects complies with the express requirements of this Act shall be valid for all purposes, notwithstanding (f) Failure to register the marriage.

It is worth noting that in the area of conflict of laws, capacity to marry is governed by domiciliary law, i.e., lex domicilii. A party must have capacity by his domociliary law to contract a marriage otherwise he might find himself married in one state and not married in another. The formalities

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16/ Law of Marriage Act 1971, S.42.

17/ Ibid., S.43, (1,2.3).

18/ Ibid., S.43, (5,6,7).

19/ Ibid., S.41, (f).

20/ Law Reports of Tanzania, No.54, (1975).

necessary for the contracting of marriage are governed by the Laws of Place of Celebration, i.e., lex loci celebrationis.

4. Consent. Lack of consent by a party to a marriage makes a marriage void ab initio. It is an express requirement of the law that ...

S.16(1) No marriage shall be contracted except with the consent, freely and voluntarily given, by each of the parties thereto.

(2) For the purpose of this Act consent shall not be held to have been freely or voluntarily given if the part who purported to give it:

(a) was influenced by coercion or fraud; or

(b) was mistaken as to the nature of the ceremony; or

(c) was suffering from any mental disorder or mental defect, whether permanent or temporary, or was intoxicated, so as not fully to appreicate the nature of the ceremony,

and references in this Act to "consent" or "consent freely given" in relation to a party to a marriage or an intended marriage shall be construed as meaning consent freely and voluntarily given.

In Bashford v. Tuli 21/ Judge Hamlyn held that the marriage between the parties was null and void for lack of consent. In this case the consent of the wife to the marriage was induced by misrepresentation. The facts of the case were as follows. The parties met in Ontario Canada in 1968 and married under Islamic Law before a local Imam. The petitioner thought at the time of the ceremony that the respondent was unmarried and she stressed in her evidence that it was part of the bargain of her marrying the respondent that he was to remain a single man. When the parties went to the respondent's house in his country, he introduced the petitioner to two women as his other wives, whom he had married before his marriage to her. The petitioner then left the respondent immediately and petitioned to the court to declare her marriage null and void.

Where lack of consent to a marriage is alleged the court looks at the surrounding circumstances and might make an adverse finding but the couple have been living together for a long period, consent can be presumed. In the case of Ally Mfaume Issa v. Fatuma M. Alkamu 22/ in a marriage which had already lasted for 17 years the wife alleged lack of consent, her petition did not succeed. In the case of Fatu M. Masudi, cited above, it was evidenced that the marriage was arranged by the parents of the couple and the trial court came to the conclusion that the marriage was null due to lack of consent. The judge of the Appellate Court, Judge Kisanga, held that the parents may arrange a marriage for their children provided that the children themselves, being of age, subsequently approve and enter into such a marriage willingly.

21/ High Court Digest, No. 76, (1971).

22/ Law Reports of Tanzania, No.68, (1974).

It should be noted that marriages which are void for lack of capacity to marry or lack of consent to the marriage or where there was some formal irregularity, are governed by Section 38 of the Law of Marriage Act.

S.38 (1) A ceremony purporting to be a marriage shall be a nullity:

(a) save where leave has been granted under subsection (2) of section 13, if either party thereto is below the minimum age for marriages; or

(b) if the parties thereto are within prohibited relationships; or

(c) if either part is incompetent to marry by reason of an existing marriage; or

(d) if the court or a Board, in the exercise of the power conferred by section 22, has directed that the intended marriage is not to be contracted; or

(e) the consent of either party was not freely and voluntarily given thereto; or

(f) unless both parties are present in person at the ceremony; or

(g) if both parties knowingly and willfully acquiesce in a person officiating there who is not lawfully entitled to do so; or

(h) unless two competent witnesses are present thereat; or

(i) if it expressed to be of temporary nature or for a limited period; or

(j) if the wife was a widow or a divorced woman prior to the marriage and her previous marriage having been contracted in Islamic form, she contracts the other marriage during the customary period of iddat.

5. Family Name. The law of Marriage Act, 1971 is completely silent on one of the areas which is governed by the customs of the people. Our marriages are characteristically exogamous, i.e., a man does not seek a wife within his father's clan, nor can a woman be married in her father's clan. Marriage has to be contracted with a party from a different clan. Since it invariably involves a transfer of the woman to the clan of the husband, she becomes wholly subsumed in her husband but she never becomes a member of her husband's clan and so she never assumes her husband's name. Under Islamic Law women never assume their husband's names.

The taking of the husband's name by the wife is a modern element brought in by the colonial administration. It evolved on the principle of oneness and to that effect Blackstone comments that:

'By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything." 23/

Such a notion was based on the fiction of oneness of husband and wife. It was and still is a manifestation of the subordinate position of a woman to the effect that after marriage she loses her identity and individuality and adopts that of her husband. On Women's Day 24/ President Nyerere, addressing women publicly, rebuked them for adhering to practices which perpetuate their status of inequality. Among the things he mentioned were the taking of the husband's name after a woman has been married. It is our belief that the adoption of a husband's name once a woman is married is one way of perpetuating the inferiority of women and it is a practice which should henceforth be discarded. A woman should choose freely to acquire any name she wishes or she should retain her maiden name.

E. Effects of Marriage

The common law fiction of oneness was derived from canonical principles, and it led to a general definition of monogamous marriage, as defined in the case of Hyde v. Hyde 25/ by Lord Penzance who commented:

"I conceive that marriage, as understood in Christendom may be defined as the voluntary union for life of one man and one woman and one woman to the exclusion of all others."

The same definition was extended to the colonies although most of the marriages did not fit the general definition. In Common Law the status of marriage fused the legal personalities of husband and wife into one and upon that union developed the fiction of oneness and the legal rights, duties and disabilities of husband and wife depended on this union. As a consequence the wife could not contract, sue or be sued independently unless through the next of kin who was her husband. The fiction of oneness was a foreign element and did not fit in the conception of a customary or Islamic marriage. A customary marriage is in the first instance an alliance between two kinship groups, while an Islamic marriage is considered as a purely civil contract between the two parties to the marriage. The wife is the property and man is the consideration. 26/

1. Contract. Under the Law of Marriage Act a wife has the same rights to property as the husband. She can contract, sue or be sued and hold or

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23/ Blackstone's Commentaries.

24/ 8th March 1975.

25/ Law Reports, I.P and D, 130, 133, (1866).

26/ Bashford v. Tuli, High Court Digest, No.96.

dispose of property. Marriage does not change the position of the woman in regard to property. 27/

2. Criminal Law. A husband has never been held vicariously liable for the crimes of his wife; nor has the doctrine of unity ever prevented spouses from being liable for crimes committed to each other.

3. Marital Coercion. It was a presumption that where the wife committed certain offences in the presence of the husband then she had committed the crime under his coercion and subsequently it was he who would be convicted. Through changes in the law the onus of proving marital coercion is now placed upon the wife. The Penal Code provides that:

S.20 A married woman is not free from criminal responsibility for doing or omitting to do an act merely because the act or (sic) omission takes place in the presence of her husband; but on a charge against a wife for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of the husband.

4. Conspiracy. Husband and wife could not be convicted of conspiring together owing to the doctrine of unity. 28/ The law has changed and husband and wife are now capable of conspiracy. 29/ Under section 386 A it is stated that:

S.386 A For the avoidance of doubt, it is hereby declared that a husband and wife may be guilty of conspiring together, whether their marriage was monogamous marriage or a polygamous marriage.

5. Theft. Under the doctrine of unity husband and wife were deemed to have unity of possession that neither could be guilty of stealing of the other's property. Now that a wife and husband are considered separate individuals with capacity to hold property in their own names the law can find them guilty of stealing each other's property. The amended law provides that, 30/

S.264 'For the avoidance of doubt, is hereby declared that a husband may be guilty of stealing from the wife or a wife from her husband."

6. The Evidence Act 1967. Generally speaking the law protects marital confidences from publication and where confidences have to be part of evidence in civil or criminal proceedings, spouses are not compelled to act as witnesses against each other. Section 130(4), of the Evidence Act

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27/ Law of Marriage Act 1971, S.56,58.

28/ Mawji v. The Queen, I, All E.R. No.385, (1957).

29/ Law of Marriage Act 1971, 2nd Schedule.

30/ Law of Marriage Act 1971, 2nd Schedule P.C., S.264.

indicates that the evidence of the spouse has to be corroborated in order for the other spouse to be convicted on the evidence. Some other incidental amendments have been further clarified by case law for example in the case of Republic v. Lwenyakali 31/ the court held that in a polygamous marriage any of the wives is a competent but not a compellable witness for the prosectuion and the expression, the person or property of the wife, under proviso (b), to section 130 of the Evidence Act, includes co-wife.

Some other legal effects are not so relevant for the matter under consideration. I only wish to point out that a man cannot be convicted of rape on his wife. This attitude is unfair for it gives a man a lot of leeway for abuse. At most a man could be convicted of assaulting his wife if, when in the course of enforcing marital rights, he causes bodily harm. The issue of forcing and ultimately raping should normally not arise when parties are living amicably and basking in marital bliss, however, the law should make it possible for wives to sue their husbands in cases of rape.

F. Rights and Duties of Spouses during Marriage

Rights and duties between husband and wife arise out of cohabitation. They give companionship to each ther and have many duties and obligations to one another. The law is only concerned with the obligations arising out of marriage.

1. The Matrimonial Home. Traditionally it was the right of the husband to determine the matrimonial home and consequently his duty to supply one. His superior economic position gave him the upper hand. Socio-economic changes have necessitated change in attitudes and the issue of a matrimonial home is considered a domestic matter and should therefore be decided by both. In patrilineal societies marriages are patrilocal and the husband must provide a home. Among the working class some have acquired new residence in urban centres and have lost contact with their village homes. Under these circumstances parties are in a position to establish a matrimonial home of their choice. In newly established Ujamaa Villages we might assume the same, people construct their house and slowly acquire furniture or any other property for the matrimonial home. According to the Laws of Marriage Act:

Matrimonial Home means the building or part of a building in which a husband and wife ordinarily reside together and includes

(a) where a building and its curtilage are occupied for residential purposes only, that curtilage and any outbuildings thereon; and

(b) where a building is on or occupied in conjunction with agricultural land, any land allocated by the husband or the wife, as the case may be, to his or her spouse for her or his exclusive use.

31/ Law Reports of Tanzania, No.91, (1973).

2. Duty to Maintain. As long as the marriage subsists it is the duty of the husband to maintain his wife or wives and his infant children. Section 64 of the Marriage Act provides that,

S.63 Except where the parties are separated by agreement or by decree of the court and subject to any subsisting order of the court,

(a) it shall be the duty of every husband to maintain his wife or wives and to provide them with suchaccommodation, clothing and food as may be reasonable having regard to his means and station of life.

In the absence of an agreement to separate or judicial decree to that effect, the duty of the husband to maintain subsists. In the case of Paulo Ifunya v. Edward Zakayo 32/, a father-in-law successfully claimed reimbursement from his son-in-law for maintaining the respondent's wife and children. The respondent did not maintain his wife who had delivered twins and was further prevented from taking produce from the farm by her mother-in-law. The wife went back to her parents and informed her husband, who was working in town, of her action. The husband did not acknowledge this nor did he send any money for maintenance and for a period of $4\frac{1}{2}$ months the father of the wife took care of his daughter and grandchildren, later claiming reimbursement for the expense from the husband. The appeal was allowed on the grounds that the respondent had a legal obligation which he failed to honour and that if the conduct of the husband is the cause of the wife's departure from the matrimonial home then the duty of the husband to maintain still subsists 33/ but where the wife for no legally justifiable reason refuses to return and live with her husband she will be disentitled to any maintainance by her husband. 34/

The duty to maintain devolves on the wife when circumstances stipulated in the Marriage Act exist,

S.63 (b) it shall be the duty of the wife who has the means to do so, to provide in similar manner for her husband if he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health.

A wife who has been neglected may apply for the enforcement of orders under section 115 of the Laws of Marriage Act, which stipulates that,

S.115(1) The court may order a man to pay maintainance to his wife or former wife,

(a) if he has refused or neglected to provide for her as required by section 63;

(b) if he has deserted her, for so long as the desertion continues.

32/ High Court Digest, No.19, (1970).

33/ Kondo v. Mwajabu d/o Juma. High Court Digest, No.236, (1972).

34/ Maulidi s/o Ally v. Hawa d/o Athumani. Law Reports of Tanzania, No.39, (1975).

Where there are children and any other dependants it is the duty of the spouses to take care of them. Section 63 is coextensive in conjuction with section 129. It is the duty of the husband to maintain his infant children, whether they are in his custody or in the custody of any other person, either by providing them with suchaccommodation, clothing, food and education as may be reasonable having regard to his means and station in life. A woman has a duty to maintain the infants in her care where a marriage is a nullity or has been annulled, or in case the father has died or his whereabouts are unknown. 35/ Violation of one's obligations to children or minor dependants entails criminal sanctions. 36/

The material aspect is not the only consideration of parent's duty to their children, it is universlly recognised that marital conflicts, strife and animosity cause much psychological strain on children. Parents have a duty, which is independent of legal duties, to create conditions for the healthy and stable growth of their children. I would say that in our traditional customary unions where mothers put up with many inconveniences children were less emotionally disturbed and they were less exposed to the conflicts of their parents and had a wider choice of forming attachments within the family group. It is therefore necessary and important for spouses, in modern marriages, to examine this duty critically and try to adjust to modern conditions.

G. Other Incidental Rights and Duties

1. Sexual Intercourse. A marriage which has not been consumated can be invalidated on the application of either party. 37/ It is therefore necessary that a marriage be consummated and where a party persistently refuses to have sexual intercourse, it could be a matter upon which a court determines whether a marriage has broken down since it might amount to cruelty. 38/ Therefore spouses have a mutual right to sexual intercourse but this must be reasonable and the demands should not become so inordinate as to cause a breakdown of health. 39/.

2. Agency of Necessity. A wife has a right to pledge her husband's credit in order to obtain the necessities of life. This is an irrevocable right though it can be rebutted by factual proof that it was not necessary for the wife to pledge her husband's credit. 40/

35/ Law of Marriage Act,1971, S.128, 129,(2).

36/ Ibid., P.C., Cap. 16, S.166, Desertion of children, 167, Neglecting children.

37/ Law of Marriage Act 1971, S.39, (a).

38/ Ibid., S.107, (2), (c).

39/ Foster v. Foster p.438, C.A. (1921).

40/ Law of Marriage Act 1971, S.64.

H. Separation and Divorce

1. Separation can be obtained judicially 41/ or by agreement 42/ where a marriage has broken down. Once parties are separated they are released from the duty to cohabit although they are still legally married. Separation agreements must always include terms of maintenance, division of matrimonial property and custody of children. It is also essential that parties agree not to molest each other, otherwise a party may apply to court to issue an unjunction against molestation. 43/ Separations may be a step to a divorce or may be meritorious in that they give a chance to parties to cool off. Owing to matrimonial strife parties may have reached a stage in which reason alone is not enough and it is my opinion that a woman would stand to gain by separation. Separation agreement terms can be varied if there are changes in circumstances and a separation agreement is discharged if one of the parties repudiates one of its terms or if parties resume cohabitation or where a divorce decree is obtained.

2. Divorce. Divorce is termination of marriage. Under the Laws of Marriage Act, a marriage can only be dissolved either by death or by a judicial decree. Where a husband dies the widow is free to reside wherever she may please and to remain unmarried or to marry again any man of her own choosing. 44/ A woman is freed from being inherited as part of her husband's estate.

(a) Presumption of Death

Where it is proved that a spouse has not been heard of for five years, by those who might be expected to have heard of him if he were alive, there shall be a rebuttable presumption that he is dead. 45/ In such circumstances a spouse may petition for a declaratory decree to declare that person dead 46/ and also to obtain a decree of dissolution of marriage in case that person is not dead. 47/

(b) Judicial Divroce

A party may petition for divorce on the ground that the marriage has

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41/ Ibid., S. 99, A married person may petition for a decree of se separation.

42/ Ibid., S.67, Separation agreements are valid under the law.

43/ Ibid., S. 139.

44/ Law of Marriage Act 1971, S.68.

45/ Ibid., S.161(1).

46/ Ibid., S.99, (2), (e).

47/ Ibid., SS. 161, (2), (1). It is essential to obtain a decree of dissolution on grounds of desertion, if a wife wishes to remarry, so that when the person presumed dead is alive, it will save a lot of embarassment. Under the Marriage Act, a woman cannot contract another marriage when the first one subsists.

broken down. 48/ The marriage should have subsisted for two years preceding the date of the petition, otherwise special leave of the court to petition for divorce has to be obtained. 49/ No petition for divorce may be entertained by any court of law before the dispute between the spouses has been referred to a Marriage Conciliatory Board and the Board has certified that it has failed to reconcile the parties. 50/ The Marriage Act places much emphasis on reconciliation and parties are required to refer their disputes to Conciliatory Boards whenever necessary. When a party petitions for divorce the petition should inclue among other things, a certificate issued by the Board not more than six months before the filing of the petition. 51/ The court may accept any number of matters as evidence that a marriage has broken down but proof of any such matter shall not entitle a party as of right to a decree. 52/ Matters which may be taken as evidence of the breakdown of marriage are adultery, sexual perversion, cruelty, wilful neglect, desertion for at least three years, life imprisonment or imprisonment for a term of five years, mental illness, change of religion, and in case of Islamic marriage, talak pronounced after the Board had certified that it has failed to reconcile the parties. The following cases illustrate matters which are considered as evidence of the breakdown of marriage. In the case of Elizabeth Kamulindwa v. Austin Kamulindwa 53/ the court held that the overall effect of the husband's alcoholic conduct had produced an adverse effect on the petitioner's health and that this amounted to cruelty. In the case of Ashura Salimu v. Alli Saidi 54/ the wife alleged that the husband always refused to take her to the hospital for treatment when she was pregnant even though she suffered severe illness during pregnancy. Her allegations were supported by the fact that within seven years of marriage she had four miscarriages and one living child. Her husband's attitude indicated that he was not concerned because whenever she requested him to take her to the hospital he used to tell her to go to her father because he himself had no knowledge of such things as hospitals. The court held that the evidence proved that the marriage had broken down irreparably. The case of Maria Shevschenko v. King D.A.N. Mwamakula, which is cited in Annex IV below, illustrated further the court's views on irreparable breakdown of marriage.

48/ Ibid., S. 99, subject to S.77, 100, 101.

49/ Ibid., S.100. Selemani Ali Dadi v. Fatu Dadi, High Court, Matrimony, Civil Application, 45 Mtwara (1972), petition was found premature because the marriage was only 14 months old.

50/ Law of Marriage Act 1971, S.101.

51/ Ibid., S.106(2).

52/ Ibid., S.107.

53/ Law Reports of Tanzania, No.11, (1974).

54/ High Court, Matrimonial, Civil Application, 39, (1973).

As regards Islamic marriages the law has provided that subsequent to the granting by the Board of a certificate that it has failed to reconcile the parties they may apply for divorce if either of them has committed any breach which would, but for the provisions of this Act, have dissolved the marriage in accordance with Islamic Law. 55/ A marriage contracted under Islamic Law can be dissolved by the following types of divorces,

(a) talak;
(b) khula divorce;
(c) fask divorce, (judicial decree);
(d) apostacy of wife;
(e) mubara divorce.

The commonest form of divorce is talak. Under the Laws of Marriage Act talak alone is not sufficient to dissolve a marriage. Judge Kisanga 56/ clearly stated the position of talak under secular law. He said that once the husband has divorced his wife by talak:

> " ... he may be quite satisfied and very clear in his conscience that according to the rules of Islamic Religion there is no relationship of husband and wife between himself and the respondent ... but according to the Secular Law which is contained in the Act of Parliament referred to above, it would seem that talak only represents a manifestation of an intention to terminate an Islamic Marriage although by itself it cannot dissolve the marriage for all purposes however strongly it may be worded or however definitive it may seek to be in content." An Islamic marriage must be terminated by a decree of court, and as Judge Samatta rightly stated, the Islamic Law of talak was given a mortal blow by the Law of Marriage Act. 57/

Once the petitioner has proved matters which are evidence of the break-down of marriage the court is required to decide whether or not the marriage has broken irreparably. 58/ Where a marriage has broken down irreparably the court shall grant a decree of divorce and other ancillary reliefs requested. 59/ After divorce a wife is not entitled to maintenance from her husband unless the court for special reasons so directs. 60/

As noted earlier a petitioner may prove all matters evidencing the break-down of marriage and yet the court may hold that the matters are not sufficient

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55/ S.107, (3).

56/ Op.cit., Selemani A. Dadi v. Fatu Idi.

57/ Amina Mohammed v. Selemani Selemani, High Court, Matrimonial Cause 39, DSM, (1976).

58/ Law of Marriage Act 1971, S.107.

59/ Ibid., S.10, (a).

60/ Ibid., S. 115, Proviso.

to find that a marriage has broken down irreparably. In that case the court will dismiss the petition 61/ but it has no power to make other orders, and if a court orders a wife to go back to her husband it is acting illegally. In the case of Aida Nangonde v. Ambilikile Kibali 62/ the Primary Court dismissed the wife's petition for relief from the tie of matrimony and ordered the appellant to rejoin her husband. When the wife appealed against the decision of the lower court, Judge Samatta made it abundantly clear that:

> " ... the order requiring the appellant to rejoin her husband sinned against the law. Why am I of that view? I will answer that question by quoting, if I may, what I ventured to say on an identical issue, whatever the law may have been before the Law of Marriage Act 1971 came into force, a wife now cannot be compelled by a court of law to live with her husband. That Rule of Law is a logical product of the provisions of s.140 of the Laws of Marriage Act 1971. Traditionalists may protest against that rule but their voices cannot be heard by a court of law. The voice of the Law will drown their protests; times have changed. In a marriage a wife is an equal partner and she is no longer in law compellable to live with her husband. At the risk of her marriage being dissolved, she may choose to leave the matrimonial home and live elsewhere. Some people may say that this is a social revolution, it is!"

The order compelling the appellant to rejoin her husband was set aside. Actually section 140 of the Laws of Marriage Act repealed proceedings for Restitution for Conjugal Rights. This practice arose out of conditions in which a wife, as a chattel of her husband, had to go back to him and live with him against her own volition. The husband had proprietary rights in her, therefore in instituting proceedings for restitution of conjugal rights he was lawfully recovering his property. In this era of equality we cannot have that, marriage has undergone considerable changes. Since a marriage is a voluntary union between the two parties the application of coercion would negate the voluntary aspect.

Under the Laws of Marriage Act all courts have original and concurrent jurisdiction, though Primary Courts have no jurisdiction over Christian marriages. Appellate jurisdiction lies with the High Court 63/ and the Court of Appeal.

I. Rights and Duties on Dissolution of Marriage

When a marriage is dissolved rights and duties between spouses cease. Dissolution of marriage terminates the marriage contract and all incidents

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61/ Ibid., S.110, (b).

62/ High Court, Matrimonial, Case 9, MBEYA, (1978).

63/ Law of Marriage Act, S.80, as amended by Act No. 23 (1973).

arising out of the contract and parties are released from all the duties towards each other. A husband has no further duty to maintain his wife nor has the wife a reciprocal duty to her husband, save only and unless the court for special reasons so directs. 64/ In other words the statutory basis of awarding alimony is non-existent under the Laws of Marriage Act. In a case where a spouse is ordered to pay maintenance after dissolution of marriage the duty ceases on the death of either 65/ and on remarriage by the spouse in whose favour the maintenance order was made. 66/ A woman who has been wholly a housewife may face extreme financial hardship and the law should have at least made some provision for those who have been totally devoted to the upbringing of the family, after all the majority of women in Tanzania fall into this category owing to the fact that they do not have any wage earning occupation to their credit. 67/

1. Parents and Children on Dissolution of Marriage. Most of the litigation on custody prior to the passing of the Law of Marriage Act evolved on issues of paternity. Once paternity was determined custody would follow the customary principles in most cases. Under customary law children born in wedlock belong to the father since he paid bridewealth. Paragraph 175 of the Customary Law, (Declaration), Order GN.279 of 1963, declares that "children born in wedlock belong to the father." In the case of Mgowa Madole v. Mgogolo Dododa 68/ it was held that among Tanzanian patrilineal tribes all children conceived during wedlock, including adulterous children, belong to the husband. The notion of the welfare of the children was of no value where a wife was married for purposes of procreation and to increase her husband's clan.

After the enactment of Laws of Marriage Act courts have tended to seriously address themselves to the issue of custody of children, especially as far as the welfare principle is concerned. The Act provides that,

S.125, (2) In deciding in whose custody an infant should be placed the paramount consideration shall be the welfare of the infant and, subject to this, the court shall have regard,

(a) to the wishes of the parents of the infant; and,

(b) to the wishes of the infant, where he or she is of an age to express an independent opinion; and,

(c) to the customs of the community to which the parties belong.

64/ Law of Marriage Act 1971, S. 115, (1), Proviso.

65/ Ibid., S. 119.

66/ Ibid., S. 120.

67/ Property relations will fully be discussed in the section on property but it is worth mentioning at this juncture that a wife who has no wage earning occupation is not considered as having contributed to the acquisition of property.

68/ Law Reports of Tanzania, No.8, (1973).

The welfare principle is not concerned only with material welfare, it involves consideration of the character of the parties claiming custody, the education of children, psychological factors and also the age of the child and the sex. It is a presumption of law that a child in tender years, especially below the age of seven, should preferably be in the custody of the mother or that young girls are much better off with their mothers.

Where custody is granted to the mother the father has to pay maintenance for his children 69/ and a parent who has been deprived of cusotdy of the child may be given a right of reasonable access to the infant. 70/

The present position of the law favours the father more because courts still have to resort to relevant customs of the community to which parties belong, customs which more often recognise a father's absolute right over the children. Statutory law has not changed the position as it permits the application of customary principles which never equate the spouses claims.

2. Guardianship. This is governed by customary law. 71/ Under this law there are four instances in which a guardian may be required and subsequently appointed. The one instance relevant for our subject will be considered below.

3. Guardianship of Minors whose Father is Dead. A guardian, usually a man, is appointed by a clan council. He can be one of the eldest adult children of the deceased and must be of good character, or he may be any other member of the clan if the eldest adult child of the deceased is unsuitable or all children are still minors. In a polygamous household each eldest adult male child will act as a guardian of his younger brothers and sisters. A mother is never considered capable and competent to look after her own children and property. At most she can be inherited as any other piece of property in her husband's estate. Where she does not marry any member of the clan but chooses to remain a widow then she is assisted in the upbringing and care of her children and their property and in case a guardian acts beyond his powers, perhaps by attempting to sell the land he is supposed to administer for the children, a mother can institute proceedings for recovery if requested to do so by her children. 72/

69/ Law of Marriage Act 1971, S.126(2), (d).

70/ Customary Law Declaration. Para., 175, GN., 279, (1963).

71/ Ibid., Government Notice No. 436, (1963). First Schedule, Laws of Guardianship.

72/ Law Reports of Tanzania, No. 10, (1973). Evarista Kajuna, v. Thereza Jacob.

VI. PROPERTY LAWS

Under the statutory law a woman has capacity to acquire, hold and dispose of property, whether movable or immovable. This depends on an individual woman's economic power and education. Women who are involved in petty trade and businesses are sometimes given starting capital by their husbands or they save some money from house-keeping money. Sometimes the City Council, for example, the City Council of Dar es Salaam, initiates economic projects for interested groups of women and supplies initial capital and expertise where necessary. The proceeds from these projects are divided equally among the members and if the proceeds are considered as a woman's private property then she is free to utilise it in any way she thinks suitable.

A. Wages

A wife's wages are normally her private property and she is free to use them in any way, she is not compelled to use it in the household. An unmarried woman is of course in an advantageous position in that she does not have a husband who might demand her wages. Many conflicts evolve around the issue of wages, some husbands, out of malice and overpossessiveness, demand an unconditional surrender of their wive's salaries. It is my view that a sensible solution could be reached if both parties agreed on how they are going to use their wages. The same view is also valid for savings accounts since very few women open a joint account with their husbands for fear of trickery. In the case of Margret Mwakilasa v. Timothy Mwakilasa, 1/ the husband managed to convince the wife to open a joint account with him but all along the husband had been withdrawing the money and had used it to build a house in his home area and to pay bridewealth for another wife.

B. Loan and Credit Facilities

Most women find it difficult to obtain a loan or credit owing to the conditions required in order to obtain them, one of the conditions requires the applicant to offer security and this security must be valuable. It may be an insurance policy, movable or immovable property such as a house, a factory crops or animals, etc but the majority of women do not own such valuable property. Fortunately it is possible for women to obtain loan and credit facilities if they form a co-operative society, which in Tanzania get much sympathy and aid if their object is the promotion of the economic interest of its members in accordance with co-operative principles. 2/ Under the powers of the Co-operative Societies Act, a society can receive deposits and loans from

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1/ High Court, Matrimonial, Case No. 14, (1974).

2/ Co-operative Societies Act 1968, Act No. 27, s.4.

institutions offering such loans. In the past few years women have utilised these opportunities to open economic ventures on co-operative basis. 3/

C. Right to Inherit and Dispose of Property

Women are still faced with limitations as far as inheritance and disposition of property and the law which is applicable makes a discriminatory distinction between males and females and the equivalent shares they are entitled to receive at inheritance and disposition.

Among the patrilineal tribes women do not normally inherit land from their deceased father owing to the exogamous nature of the marriage and patrilocal residence. James and Fimbo 4/ observed that barriers against women are breaking down owing to Mohammedanism, which insists on equality in the division of property among all the children of the deceased and also owing to the effect of statutes passed with the purpose of removing the disabilities against women. The estate of the deceased can be administered according to either customary law, 5/ if the deceased was a member of a tribe and did not profess the religion of Islam, or according to the Indian Succession Act 1865 if neither of the laws apply. 6/

Customary Law, which governs the majority of the people, recognises limited rights of females to property but Rule No. 1 declares that property rights are vested in the male line. This means that property rights of females are only derivative from the male. Where a person dies intestate and leaves male and/or female children these children are entitled to inherit all his property exclusively. 7/ The main heir is the eldest son of the first house 8/ but if there are no sons then the eldest daughter of the first house will be the main heir. 9/ However, the daughter cannot dispose of land, she can only derive the usufruct therefrom for her life-time. 10/ The inheritance is categorised in three degrees; namely first, second and third degree and daughter are grouped in the third degree and consequently receive the least of the property. 11/ The case of Ndewawosia d/o Ndeamtzo v. Imanuel s/o Malasi cited in Annex III of this work, expresses

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3/ The failure of some ventures can be attributed to the small amount of initial capital, mismanagement or lack of managerial skills.

4/ R.W. James and G.M. Fimbo, Customary Land Law of Tanzania. Source Book, 1973), p.193.

5/ Local Customary Law (Declaration) Order, No.4 (1963), Laws of Inheritance, GN 436/63.

6/ The Administration (Small Estates) Ordinance, Cap. 30, as amended by the Probate and Administration Ordinance, Cap. 445, s.19 & 20.

7/ Local Customary Law (Declaration) Order, Laws of Inheritance, Government Notice 436/63, Rule 26.

8/ Ibid., Rule 19.

9/ Ibid., Rule 29.

10/ Ibid., Rule 31.

11/ Op. cit., Rules 21, 25, 22 and 23.

and upholds in principle the views of most of the women on property.

1. Widows. The position of widows is not a happy one either, a priori a widow has no share of the inheritance if the deceased left relatives of his own clan and she is only entitled to be cared for by her children just as she cared for them. 12/ A childless widow is in a better position because she is given a share of the movable and immovable property acquired during married life. 13/ The plight of widows is still neglected by the legislature. In many tribes once the husband dies the relatives of the husband make a claim to all the property and children of the deceased and the wife is usually driven away by the greedy relatives. Her only redress is to turn to the law courts but owing to the inconsistency of Customary Law the courts usually affirm laws which are not equitable to women and widows often do not seek relief from the courts. The position of widows is a serious matter and we feel that the Party and Government should intervene on their behalf. For example, why should recognition not to be given to the production and the contribution a woman made in her married life, why should she not be given the freedom to bring up her children, especially when these children have already lost one parent and why should a widow be placed under the case of a guardian? The Law of Marriage Act has prohibited levirate marriages but what economic security has a widow got instead. Even in Ujamaa Villages the law has not provided for the incidents in the personal lives of the Wajamaa,'the socialist villagers' because Customary Law, which works gross injustices to women, is still applicable.

2. Property Acquired or Developed during Marriage. A married woman can acquire property in her own name but it is a rebuttable presumption that property acquired in the name of one is absolutely hers to the exclusion of the husband and vice versa. 14/ I think this position of the law is a shield for wives because it is a general practice that husbands always put their names on everything they acquire for joint use and it would be advisable if wives put their names on such acquired properties to avoid future conflicts. Alternatively the law should presume that the properties acquired in the name of one were actually acquired through the joint efforts of both. Issues of determining property ownership or degrees of contributions usually arise during matrimonial proceedings when the marriage has broken down.

In Tanzania we are building a society in which all people, men and women, are equal. It is a society in which each individual works and through his labour creates property. It is also a generally-known principle that if you deny or take away such an individual's rights to property you are exploiting him, meaning that you are actually killing him. In that case any reforms concerning rights of individuals to property should be radical. Men have always appropriated the property of producing women under the pretext that it

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12/ Ibid., Rule 27.

13/ Government Notice, 279/1963, Rule 77.

14/ The Law of Marriage Act 1971, s. 60.

was the duty of women to produce and not to own property and it is time that an equitable distribution of property was introduced and implemented. I propose that in case of death of the husband a widow should retain rights in all the property she developed or acquired in the lifetime of her husband, she should also remain with the children because in most cases relatives take these children not for the love of them but rather for mercenary purposes.

3. Property Relations between Husband and Wife. Prior to the enactment of the Law of Marriage Act 1971, a wife had no right to her husband's property unless she had contracted with him.

In the case of Idd v. Ali s/o Mpate it was held that a wife does not acquire proprietory rights in her husband's landed properties simply because she contributed labour in developing them and therefore she guins no inheritance rights therein. The wife alleged that four shambas 15/ were bought by money saved from family funds by her husband and herself when they were living together as husband and wife. Citing a similar case as authority the court held that the wife's performance of her duties when she cultivated and planted coconuts in the shambas of her husband did not entitle her to claim any property.

Section 114 of the Law of Marriage Act empowers the court to order the division of assets of a couple or the proceeds acquired by them during the marriage by their joint efforts. Assets include those owned before the marriage by one party but which have been substantially improved during the marriage by the other party or by their joint efforts. The Joint Efforts doctrine is somehow still embedded in the Common Law principles and it requires a spouse to have contributed substantially either in terms of money contributed or momentary benefits foregone. This completely precludes a housewife who has slaved in the house taking care of the children, the husband and the household as a whole. The authoritative case at the moment is Hamid Amir Hamid v. Maimuna Amir 16/ in which the wife requested, among other things, the division of matrimonial property acquired through their joint efforts. The properties in dispute were two houses and Shs. 50,000/= held in a banking account. In the records it was not recorded how long the parties had been married but it was averred, as far as the issue of contributions are concerned, that the wife, during the subsistence of the marriage, ran the household, cooked, washed and saved money and that this should be considered as her contribution. Judge Patel, in considering the issue of the wife's contribution refused to recognise the duties of the wife as part of the contribution, the fact that her duties saved the money which might otherwise have been spent was deemed irrelevant. Judge Patel stated that, " .... In fact there was no evidence at all to show that the petitioner's contribution or effort was directed towards acquisition of property or that cash saved by

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15/ Swahili word for farm.

16/ Law Reports of Tanzania, No.55, (1977).

her labour was used for the house at Songea. ... I am unable to agree with the submission that because a wife runs a household, washes, cleans, cooks and saves money each month that this should be termed as her contribution and joint effort towards acquisition of property during the subsistence of marriage". He concluded by stating that had the legislative intended to make the duties of a housewife part of the contribution then it should have been expressly stated in Section 114 of the Laws of Marriage Act. Since the respondent had never in her lifetime worked for gain there was no evidence that she had contributed towards acquiring property or cash in the bank.

In Tanzania society there is a contradiction between public labour and private labour and this problem faces all women whether they are factory workers or peasants engaged in agriculture. Domestic labour is and has never been valued and it is therefore counted as somehow natural that it is not part of the contribution. Another aspect of this position is the revelation of inhumane exploitation, a woman is denied the means of production and she does not share in what she produces and even when she is given a share it might be something which will not enable her to stand on her own feet. I feel that there must be change and that this change is inevitable. We cannot propagate equality if a woman does not share in what she has created and as earlier observed, the law has divested the man of the duty to maintain his former wife and it has not offered an alternative. Owing to the pitiable economic position of the woman I feel she should be put in a favourable position, It seems after divorce she has to begin from scratch.

At the present a point of law of general public importance has been forwarded to the Court of Appeal of the United Republic from the High Court for decision. This involves an interpretation of the Law given by the Chief Justice, when he was Head of the High Court, which is now considered too narrow and restrictive. The interpretation states that the words, by their joint effort, " ... signify that the assets in question must have come into the possession of the parties through their joint efforts or, the assets must be owned by the parties through their joint efforts or, where the assets are held on trust for the benefit of the parties; the trust must arise through the joint efforts of the parties." Judge Sisya averred that there is no definition of Joint Effort anywhere in the Law of Marriage Act 1971 and to that effect he agreed that the question was a point of law and of general public importance and allowed the application. 17/

Property issues are fundamental issues for they are a matter of life and death. In our socialist-orientated society the principle consideration should be to give a person a chance for a living and a woman who is deprived of this chance has no other way but to resort to prostitution.

17/ Halima Sefu v. Anthony Mchonde, Eastern Africa Court of Appeal, Court of Appeal of the United Republic of Tanzania, Civil Application, 3, DSM (1979).

VII. EMPLOYMENT

Women are legally ensured of equal rights to men regarding employment and wages. 1/ Young persons who have not reached the apparent age of fifteen are prohibited from employment but owing to prevailing poverty and economic problems a parent prefers to have a child who brings home an income rather than have an extra mouth to feed. It is often the parents who contravene regulations protecting children, es,ecially young girls, from early child labour especially since young girls are usually employed as domestic servants from the age of 8 years to adulthood. Such young girls are subject to abuse because in most cases they are employed in places far from their home areas and this is not the only evil which they face, they also lose a chance of receiving the education which has become very essential in this era. Owing to their age, they are not capable of joining a Worker's Association which would protect them against the arbitrary acts of their employers. Under these circumstances employers determine their wages and conditions of service and do not consider their welfare. It has been discovered that young girls receive between shs. 20/ = to 150/ =and that the majority receive about shs. 80/ as wages per month. 2/

This is a socio-economic problem and every attempt at solving it has proved futile. The problem arises because the majority of peasants are very poor and have many children, some of these children have to help to alleviate the family economic problems whilst many working women have to work to supplement the family income. They have children but have no facilities for childcare, therefore they need house girls but they cannot afford to pay the house girls the government minimum wage otherwise this would cause great economic hardship so the problem remains because its solution depends on the solution of all its component parts.

A. Nature of Women's Employment

At the moment there is no statistical data on women's employment but if there was I am sure that the general trend of employment would indicate that:

(i) the majority of women are employed in the traditional professions of women such as teaching, nursing and midwifery, home economics and social welfare;

1/ Employment Ordinance, Cp. 366.

2/ Eight Tanzanian Shillingswere equivalent to one US Dollar at the time of writing.

(ii) women in factories are employed as unskilled or semi-skilled workers;

(iii) few women coccupy managerial posts not because of their disability but owing to age old prejudices against them.

Some research has been conducted in some factories in Tanzania and the following are the findings.

Parin J. Virji 3/ conducted research at the Friendship Textile Mill in 1978. Of the total labour turnover of 5360, only 10% were women. The policy of the factory was to keep a low ration of women workers which can be explained by the following:

(i) women were more costly to employ owing to maternity benefits

(ii) women were always absent owing to sick children and husbands.

On checking the data of dismissals for absenteeism Parin found that of the 4824 members of the male labour force 161 of them, representing 3.3% were dismissed for absenteeism whilst of the female labour force of 536, only 12 or 2.2% were dismissed for the same reason. It was therefore concluded that there are other more complicated reasons for excluding women from employment.

Zakia Meghji 4/ conducted research on the employment of women in a number of factories and she observed that women work in the labour intensive sections which require much more use of the muscles, hands or fingers. She also noted that in those sections which are labour intensive, once automatic machines are introduced, the males take over. For example in the Moshi Coffee Curing Factory automatic machines for sorting beans were installed in 1972. The 800 labour force of women employed in that section was sacked and a few male employees with no special qualifications were employed.

Meghzi, after finding the same segregation of employment in other factories, came to the conclusion that it is not lack of qualifications which causes these women to be employed in the lowest section of production, rather it is the prevailing attitudes that a women's place is in the home. She noted also that the employers prefer to employ male workers since the enactment of Employment Ordinance (Amendment) Act 1975. 5/

3/ Parin J. Virji: Summary of Labour Turnover at the Friendship Textile Mill with Specific Reference to Women Workers, (1978), A paper presented at BRALUP Workshop on Women Studies and Development, 1979.

4/ Zakia Meghji, The Nature of Female Urban Employment, BRALUP Workshop, (1979).

5/ Act No. 20, 1975 extended maternity benefits to unmarried women also.

M.H. Mgaya 6/ found that most of the women in a certain factory in Tanzania were in the service and administrative sections but that few were actually engaged in direct production. The above cases indicate conditions prevailing in factories and reflect the covert mainipulations which discriminate against women.

1. Job Opportunities and Training. In some factories where training facilities are available women are forced to specialise in jobs which are traditionally regarded as jobs for women. 7/ Job opportunities depend to some extent on qualifications and if women do not get access to training facilities they will always occupy the lower range of jobs. In other instances women, especially married women, are sometimes prevented going for further training by their husbands. In some cases husbands think that their wives might become too competitive due to their own lack of interest in further training. Some training institutions impose conditions which prove difficult to fulfill. For example some institutions provide that if a woman becomes pregnant while pursuing her course she will have to terminate her studies. A case which reached the Permanent Commission of Enquiry illustrates the irony of some of these regulations and the general attitudes towards women.

In case No. 920/111/3, Ministry of National Education, the complainant had been dismissed from a Domestic Science course because she was four months pregnant. This was in accordance with the regulation that none of the female students could carry on with the course if they got pregnant, whether married or not, because the pregnancy would deter their full participation. The complainant disagreed because she believed that this action was malicious, she claimed that there were several others at the college who were pregnant. During investigation it was revealed that pregnant women were not allowed to go on with their studies because of the physical and mental strain likely to cause problems to the mother's health.

It was also agreed that professional women do not have the tolerance when pregnant as compared to the rural women who have to work physically much harder. At college a pregnant woman has a lot to lose, there are no good facilities for her in terms of food and care and the place is not as peaceful as would perhaps suit a pregnant mother.

The complainant got pregnant during her 1976 vacation when she stayed with her husband. She was dismissed in October 1976 but the complainant had completed a good portion of her course so she deserved consideration and it was recommended by the Commission that she be given a chance to return to her studies in the following academic year, 1977/78.

6/ M.H. Mgaya, Women Workers in a Factory in Tanzania BRALUP Workshop, (1979).

7/ M.H. Mgaya, Op.cit., p.8.

2. Working Conditions. Women are prohibited by statute from doing manual work in mines or 8/ on night work. 9/ The law also ensures women maternity benefits such as maternity leave with pay. This provision, which was given in Section 25(B) of the Employment Ordinance was enacted in 1975 and had the effect of extending maternity benefits to every three years from the date of the last maternity leave of 84 days. Furthermore a woman employee forfeits her annual leave in the year she takes maternity leave or in the subsequent year if she has already availed herself of the leave. The employers feel that maternity leave is some sort of gift that women have to be thankful for and they fail to recognise the dual roles a woman plays in society. As a worker she takes part in the production of material goods necessary for consumption, hence as a worker she is entitled to annual leave. As a mother she fulfills her role of reproducing the labour force necessary for production and as such she is entitled to maternity leave. If and when the state recognises these two roles of a working woman one of the main contradictions for women workers will be solved.

There is a general feeling among women that they are being victimised. Why should maternity leave with pay be limited to every three years, what if a working woman becomes pregnant before the expiry of three years? When such a case arises women take leave without pay which later affects their pension. Their husbands are never affected in any way. In some Ujamaa Villages the village governments have made arrangements so that village women get maternity leave and yet do not lose any benefits. I feel that working women should be given these benefits unrestricted because they earn them although I do not think that there is any woman now who wants to have many children; economic conditions are taking care of that.

3. Housing. In the standard contract of employment, where the employer provides housing, female employees are eligible for obtaining houses.

4. Social Security. Many government institutions, organisations and institutions have social security arrangements for their workers. Workers contribute a certain percentage of their wages and the employers contribute double the amount. The government has its own pension scheme brought about by the Pension Act 1978, workers earning about 1000/ - and below contribute to the National Provident Fund. If a worker retires or she stops working she can claim her benefits subject to regulations.

5. Family Allowance.. According to the new tax law either spouse can claim tax reliefs for the family.

6. Health. Each employee is entitled to health facilities which can either be supplied by the employer or can be paid for by the employer. Only in a few institutions are women still denied health facilities for their dependants. At present the word family 10/ has not been defined to mean the wife, who may be an employee her husband and children.

9/ Ibid., S.83.

10/ Employment Ordinance, Cap. 366 ... Family in relation to an employee or recruited person means the wife or wives of that person.

7. Childcare Facilities. The existing facilities are very inadequate and, to say the least, efficient. The existing day-care centres cater for older children between the ages of 3 to 7 years. These centres face many problems such as inadequate staff and facilities. Since most of the Day Care Centres are run on a voluntary basis with no adequate guidance and supervision it was recommended that the government should take full responsibility for them. Many factories and other organizations have yet to recognize the importance of establishing child-care facilities and as a result working women face many problems in looking after children and trying to work efficiently in their job.

8. Taxation. Women and men are equally taxed, each from his own wage, whereas previously a married women's wage was taxed as a combined income with her husband even where a husband had no income. The new tax laws enacted in the early seventies taxed each individual according to his or her salary. This of course brings the government more revenue.

Women are still more or less tied to their husbands. When a husband is transferred from one station to another the woman has to meekly pack her bags and follow. It is not often possible for her to obtain employment where her husband might be stationed and she may remain unemployed for a long time until she obtains a post. I feel that the government never considers or completely ignores wives of employees who are transfered. The general trend now is that a husband might be working in one station and the wife at another. Women are slowly beginning to realise their potential and that their appendage to their husbands is a cloak of oppression which can be thrown off means that a readjustment in attitudes is necessary and is of vital importance.

VIII. EDUCATION AND TRAINING

J.J. Rousseau in his book Emile said, "The education of women should always be relative to that of men. To please us, to be useful to us, to make us love and esteem them, to educate us when young, to take care of us when grown up; to advise, to console us, to render our lives easy and agreeable. These are the duties of women at all times, and what they should be taught in their infancy."

Our present education system for women has undergone considerable recent changes but we do not need to congratulate ourselves on the fact because even now some educational institutions still have Rousseau's aims as their objectives for women's education. The point of departure in Tanzania is reflected in the Education Act 1978, which is the basis for education in Tanzania. The Education Act made it compulsory for every parent to enroll every child who has reached school age and it became obligatory for a parent to ensure the continuous and regular attendance of the child at school, otherwise a parent might be prosecuted. A parent who interrupts the education of his daughter in order to marry her off faces criminal court action and the groom faces the same consequences. If bridewealth has been paid, the cattle or whatever was paid is confiscated and used for the public good. Changes in our educational system as far as women's education is concerned are necessary in order for society to adjust to the problems peculiar to women. All primary schools were made co-educational as a step towards bridging the disparity in education between boys and girls, however much has still to be done in secondary schools owing to a limited number of girls' secondary schools and the few who are admitted usually obtained the type of education that will only enable them to opt for Arts subjects. The available statistics show that in 1976 a total of 39,947 pupils were enrolled in secondary school education, of these there were 11,309 girl pupils. 1/ The situtation for women in higher education is also pathetic. In 1975 there were 88 female students enrolled in East African Universities compared to 831 male students. Of course there must be a radical change in the enrollment of female pupils and students in secondary schools and into institutions of higher learning. Women should be admitted into schools which are exclusively male and a higher intake of female students in all institutions of higher learning should be made policy. Another major problem is the number of drop outs in schools owing to pregnancy. The policy of the Ministry of Education is that any girl who becomes pregnant while still at school must be expelled and there is no chance for the poor girls to resume her studies, this denies a number of girls their chance of education.

1/ Ministry of Education, Secondary Education: Comparative Statistics for Pupil Enrolment in Public Schools, 1961 to 1976.

In 1975 the Musoma Resolution 2/ restricted direct entries to University. Students had first to work for two years after National Service of one year. Thereafter they could be enrolled into the University but most of the girls by this time would be married and family life would interfere with their higher education. This trend was reflected in the next intake group after the Resolution which saw almost an 85% reduction of women enrolled in the University. Following the Musoma Resolution came the Lindi Resolution which enabled women to be directly enrolled in the University after one year of National Service.

The Musoma Declration and its implications on the education of women were discussed at length at the Seminar on National Commissions on Women and Development and Women's Bureaux, organized by ECA African Training and Research Centre for Women, 2-4 September 1975 in Dar-es-Salaam, Tanzania. It was here that participants made a recommendation to the effect that qualified girls and women should be dispersed from the stipulation of the Musoma declaration, as they were disadvantaged. A committee of seven, appointed at the seminar, was charged with the responsibility of seeing to it that the seminar recommendations were submitted to the National Party (then TANU) through the National Women's Organization (UWT) for consideration. Thus the seminar may have directly contributed to the Lindi Resolution.

2/ It was a party resolution on education but it did not, however, foresee the results of thir policy on Women's Higher Education.

IX. FERTILITY REGULATIONS

A. Family Planning

It is fortunate that in Tanzania the Party and Government are in favour of family planning which is part of the medical service, and it is provided by the Maternal and Child Health Services. Much criticism has been leveled against giving out contraceptives without a proper knowledge of their effects on the health of the recipient and the debate, carried on mostly by men, is still in progress. Women are in favour of family planning and for those women who have had a number of children or those who have a profession or are still pursuing their studies ocontraceptives have provided an answer to their problems. Contraceptives are made available to married women and unmarried girls who have already had a child. The Maternal and Child Health Services told us in our research that they do not want to be blamed for causing sterility although contraceptives, notably the pill, are also used for fertility purposes. Family planning has been accepted because it is not aimed at birth control 1/ but its objective is to encourage child spacing so that both mother and child will be healthy.

B. Abortion.

Abortion evolves on the issue of the right of the woman to terminate pregnancy. The law makes it an offence for a woman herself or any other person to procure or to attempt to procure an abortion. It is immaterial whether the mother is with child or not 2/ and any person who unlawfully supplies anything intended for the procuration of an abortion is equally guilty. An abortion can be procured by surgical operation if it is in good faith for the preservation of a mother's life. 3/ In other words in Tanzania abortion is illegal under any circumstances save only when it is done to preserve the life of the mother. The consequences of such a rigid position are backdoor abortions and baby dumping. Harthi 4/ observed that out of the total gynaecological admissions in Muhimbili Medical Centre in the year 1977, abortions constituted 54.6%. All these abortions were either induced or spontaneous but incomplete. Medically, she comments, abortions are hazardous when complications occur and if these abortions are carried out

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1/ This was the patent slogan which sold family planning in Tanzania.

2/ Penal Code, S. 150, 151, 152.

3/ Ibid., S. 230.

4/ Dr. J.G. Hathi: Medical Factors Associated with Abortions at Muhimbili Medical Centre, (June 1978), BRALUP Workshop Paper, (1979).

illegally under asceptic conditions complications may arise which can cause extremely bad effects on the woman.

The system operates against women, why should a woman be made to bear a child she does not want? It should be right for a woman to seek medical facilities and to have an abortion carried out legally under asceptic conditions and it is time that the laws of abortion were liberalised and abortion legalised.

Politically speaking it is time to question ourselves as to what type of equality for women we are talking about. The issues of self-determination should include the individual's right to decide over his or her own body.

X. LEGAL AID

There are no legal aid clinics established for the purpose of giving women advice on their rights and the procedures for enforcing these rights in the courts of law. Women faced with either matrimonial or affiliation problems usually seek the advice and assistance of Social Welfare Officers but the services of Social Welfare are usually remedial and not adivisory These services are restricted to the two areas which also are the concern of women. Ways have to be devised to establish information and advisory centres otherwise women will remain ignorant of the law. This ignorance of laws which safeguard the rights of women is to be found among literate women also. Advisory centres will benefit many women, especially those who cannot afford to employ advocates. It was shown in the research that when it came to the application of customary law, however adverse the outcome of the case, a woman would not challenge the decision and always assumed that the correct legal decision had been given.

XI. CONCLUSION

A concerted action on women and determined struggle will finally change the balance of power in favour of women. I have noted throughout that no law exists which specifically denies women equality of fundamental rights; yet in interpreting and applying the law discrimination arises. I conclude that the reasons for this are as follows.

(i) most of the laws arose out of relations of exploitation and subjugation of man by man. The principles embodied in the case law are based on unequal levels. There can never be equality between unequal beings. Equality will be real when conditions giving rise to inequality are finally abolished;

(ii) existing socio-economic conditions, in which a man owns the basic means of production and the woman occupies the position of the producer and reproducer so that equality of men and women cannot be realised. A woman is controlled and is a chattel of her husband. She is also the domestic slave owing to the peculiar relations between man and woman;

(iii) women have made the ideology of the oppressor their own and they cannot imagine living by themselves without being appendages of men. This situation has gone to the extent that women are the first people who sanction and perpetuate their own oppression. For example, before marriage a girl is usually told to obey her husband as a lord. And it is other women who tell her so and they would be shocked if she did otherwise. These attitudes have become part of legal attitudes and there is an immediate urgency to change these elements perpetuating the oppression of women if we want our country to develop.

XII. RECOMMENDATIONS

A. General

1. The Party and Government should generally take note of women's problems in various spheres of social and economic life. Specifically an institution should be set up to deal with problems and the development of women.

2. The Women's Organisation as a political organ for mobilising and monitoring women should be restructured and made more functional. In the following respects fundamental changes ought to be carried out.

(i) the electoral system of establishing leadership ought to be changed so as to give a chance of leadership to capable and effective leaders;

(ii) the Women's Organisation should not be the only body concerned with the problems and welfare of women because women's issues are the concern of everyone and every institution. Therefore the Women's Association should advise and assist an institution set up under Recommendation 1.

3. It was noted that women do not participate in public affairs owing to their domestic roles as housewives and due to the authority and control exercised by husbands, there is also a tradition that women lack initiative. It is therefore recommended that:

(i) ways and means be found to reduce the drudgery of housework. In Ujamaa Villages communal cooking could help to reduce time spent on food preparation. Alternative sources of fuel, easy access to water supplies, machines to help in maize or millet flour grinding would greatly assist the housewife. Childcare facilities, which must be the responsibility of the Government, are essential for the mother and must be established. Finally men must be made aware of their duty in the home. They should be made to help in housework and children;

(ii) where a woman is required in the public interest to work outside a husband should not prevent her. He should actually assist her by taking over her role in the house when she is performing public duties;

(iii) women should be encouraged to participate in national issues through education and be made aware of their indispensable service to the nation and the country. In that way women might overcome their passivity.

B. Civil and Political Rights

1. Elections. Very few women are elected to representation in Parliament, This is due to the fact that few women ever stand for elections and those who stand do not get elected. It is therefore recommended that more women should be encouraged to stand for election; those women entitled to vote should vote for women candidates and that all women should be made aware that the more women representatives they have the more able they are to effect the legislature to change those laws which discriminate against women and enact those which favour them.

2. Citizenship. We noted that in most cases a child's nationality is determined by the father's citizenship. It is recommended that this discriminatory distinction be removed in order that a child's nationality be determined by the citizenship of both parents equally. A wife whose husband is a citizen of Tanzania is entitled to be registered as a citizen upon making an application in the prescribed manner. It is recommended that the same privilege be extended to a woman who is a citizen of Tanzania married to a non-national so that the husband can be entitled to be registered upon making an application.

3. Penal Laws. Adultery is a tortious wrong entailing the payment of damages to a person who has incurred pecuniary loss and injured feelings. The aspect of compensation is mercenary. It is recommended that such actions should be abolished and instead where a criminal offence has been committed it should be dealt within the appropriate manner.

4. Sexual Offences. Rape is a heinous offence committed by a man against a woman. We noted that the law operates to protect the wrongdoer and not the victim because it leans too much on proving or imputing the intention of the offender. It is recommended that intention should be de-emphasised and that any act which is done by a male person against a female and clearly indicates an intention to sexually assault the woman should be construed to be a sexual offence. The graver the offence the heavier the punishment should be.

5. Family Laws.

(a) Under the Laws of Marriage Act, polygamous marriage are sanctioned. We noted that for a woman there is only one type of marriage, that is monogamy.

It is recommended that every person should contract only one form of marriage i.e. monogamy. Polygamy should be abolished.

(b) Consent

A girl below 18 years of age needs consent from her parent or guardian before she marries and to put a girl on an equal footing with a boy it is recommended that the only consent required should be from the court.

(c) Bridewealth

Under the Law of Marriage Act, bridewealth is no longer a requirement for a valid marriage, nevertheless bridewealth is still paid and exhorbitant amounts of it are still extorted from prospective husbands. It is recommended that payment of bridewealth should be abolished and that on marriage the parents of either side should contribute to a fund which will assist the newly-married couple.

(d) Family LName

It was noted that there are no provisions on what shoudd be the family name and that the wife, as of right, adopted the name of the husband owing to socio-economic circumstances. We also noted that traditionally women never took their husbands names as their own. It is therefore recommended that a woman should retain her maiden name on marriage or that both parties should chooseany other name as a family name on marriage.

(e) Family Maintenance

During marriage both parties contribute directly or indirectly to the maintenance of the family. A man is still considered the bread-winner and that is the reason why it is his duty to maintain the family. Where a wife is contributing to the maintenance of the family men abdicate their duty and channel their funds to other useless ventures. It is recommended that an organ should be established to expedite actions for maintenance. Court procedures take too long.

C. Divorce and Separation

Divroce or separation can be obtained where a marriage has broken down and the breakdown is irreparable. Matters which are evidence of the breakdown include the old matrimonial offences. The law restricts obtaining divorce easily. Many marriages are marriages of convenience because there is no other alternative. A woman may be forced to stick to a marriage, however inconvenient the marriage might be, owing to lack of economic security. Another person may do so owing to social desirability. A marriage might be dead for all purposes but because there are no matters to prove that the marriage has brokendown parties hold on to a make-believe marriage. It is recommended that divorce should be made easy so that parties may dissolve a marriage through mutual consent.

It has been noted that under the present circumstances a divorced woman does not have an economic basis for the continuation of life. In such a case it is recommended that a husband should have a duty to maintain a former wife unless circumstances make it unnecessary.

Under the present law parents do not have equal claims to their children and owing to the economic superiority of the husband he is invariably granted custody of children except those who are too young. It is recommended that neither parent should have a superior claim to children but owing to the fact that mothers have always cared for children they should be given custody.

When a father dies a male guardian is usually appointed to look after the minor children or the eldest son acts as a guardian of his younger brothers and sisters if he is not a minor himself. A mother becomes somehow redundant, she has no control over her children. It is recommended that where a father dies a mother should be made the guardian of her children and that owing to the fact that she will be a sole parent a person or two from the relatives may be appointed by a court to assist her but this person should not be made a guardian also.

D. Property

Men and women do not have equal rights to property. It is recommended that every person should have the same rights to movable and immovable property and that,

(i) daughters should have the same rights as sons to the property of their parents;

(ii) wives should also inherit their husband's property;

(iii) where a man dies his property should devolve on the widow and their children not on relatives, unless the property was a family venture; in which case the share of the deceased will be inherited by the widow and their children.

In case of divorce the court is empowered to order the division of assets jointly acquired during marriage. When parties marry they do not contemplate divorce and whatever they acquire in their married life is intended for their joint use. We noted also that a woman's contribution in terms of housework is not recognised. It is therefore recommended that property acquired during marriage should be considered as jointly acquired. The burden should fall on the person who alleges the contrary and division should be made equitable.

E. Employment

Among the most exploited are young girls employed as domestic servants. The laws which are meant to protect them are unenforceable owing to economic conditions. This is a problem which will require long-term solutions. It is

recommended that childcare facilities must be established either at areas of work or within the living area.

There are unfounded prejudices aimed at women and these are used as excuses for discriminating against them in employment. It is recommended that there should be proportional employment between males and females in the factories. Women are employed as unskilled or semi-skilled workers. Once automatic machines are introduced many of these workers are dismissed and men are employed instead. It is recommended that women should not be dismissed once automation is established. A few qualified women could be trained to run the machines.

It was observed that women do not get the opportunity for training and advancement and as a result they lose chances in obtaining jobs which need higher qualifications. It is recommended that crash courses specifically for women should be organised during hours of work. Training is an essential requirement for any qualified labour. There are remnants of practices and phrases which affect women adversely in employment. Such practices should be abolished and the phraseology should be construed to include female employees.

F. Family Planning

Abortion in Tanzania is prohibited by law unless performed in good faith for the health of the mother. This condition is restrictive and the actual sufferers are women who often get pregnant without intending to and may not be in a position to care for or even to love the child. Occasionally a woman might become pregnant through rape. In all these instances a woman is forced to bear a child she does not want and that is worse than abortion. It is recommended that the matter of having a child or not should be left to the woman to decide. Abortion law should be liberalised to permit clinical abortions.

G. Legal Aid

There are no services or institutions providing free advice whether legal or otherwise to women. Women constitute a large group of illiterate people and should be assisted and given advice in the various aspects which concern their lives. It is therefore recommended that centres should be established to advise women on their rights and procedures in legal and other matters.

Part Two

Marriage and Inheritance Laws Among the Luguru and their Impact on Women's Development; a Case Study of Kipera Village in Morogoro Region

I. INTRODUCTION

Women in all societies have played major roles in the development of society. They have been the producers of food and the bearers of the future generation. Unfortunately, their role is never recognised and they are given only scant consideration. Such an attitude is not surprising because in history it is the people who make events just at the right time who matter. The masses who have made these moments possible are never considered as event makers and are always the oppressed majority. In the same way women are never considered as event makers but since the turn of the century one of the central issues has become women and their role in society. For the first time mankind is realising the potential of women and the role that they may play in society. History has been written by men who did not give enough thought to the role of women; after all it is a given fact that women had to work for and serve men and it was therefore unnecessary to mention such dishonourable services. Society develops and moves according to its laws of development and it can never remain static; in the same instance the roles of the individuals are moulded according to the new tasks imposed on society. In our modern society social development is a task requiring the concerted action of all individuals in society. For the first time it has became necessary to involve conscious women in development. It has also become necessary to let women into preserves which were exclusively male, and these women need to be free women, women freed from the fetters of traditional subjugation. It is not possible to achieve such objectives without fundamental revolutionary changes in our society. To date in Tanzania we do not have truly liberated women ready to participate fully in national development. It is not only the laws that hold women in a servile position, it is also existing social institutions which perpetuate this position.

In the following report I have examined property relations in marriage and inheritance and have elaborated on how they effect the development of women. I have chosen this aspect of social life because it reflects all other relations between individuals in the community. Fortunately, we have a single Marriage Act which governs the whole of Tanzania but inheritance is subject to customary law which is only partly codified. The Luguru tribe, which was the basis of my research, is matrilineal and hence has no codified customary law on inheritance. A state of confusion therefore seems to exist owing to ethnicity among the Luguru tribe.

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I used, among other tools of methodology, a questionnaire which I tried to apply where possible. I also found that I obtained more information in an informal discussion than by questionnaire. I would normally introduce a particular topic on which I desired information and the women were mostly ready to give me any information I needed. I also used the method of observation. When I went to Kipera Village in Morogoro it was at the time of preparations for cultivation and I was able to study the work routine of the members of the family and ascertain the amount of labour input for each individual in the family. Interview was the predominant and most effective method I used to obtain information. For example, information on the past history of the Luguru tribe, customary law of marriage and inheritance was obtained using that method.

I. THE HISTORICAL BACKGROUND OF MATRILINY

Tanzania is among the poorest nations of the world, depending mainly on agriculture for export and revenue. To that effect a proportionally large number of its people are peasants involved in agricultural production. Women constitute a large percentage, almost 85 per cent, of those involved in the peasant economy but despite the important economic contributions they make they are far from achieving the same status as men. Commenting on the fact of hard work as a condition of development President Nyerere said, 1/ "It would be appropriate to ask our farmers, especially the men, how many hours a week and how many weeks a year they work. Many do not even work half as many hours as the wage earner does. The truth is that in the villages women work very hard. At times they work for 12 to 13 hours a day. They even work on Sundays and public holidays. Women who live in villages work harder than anybody else in Tanzania. But men who live in the villages are on leave for half of their lives".

The relegation of women to an inferior position is a historical fact tied up with the general development of society. When society was at a low level of development, when concepts of property and property ownership had not developed to contradictory levels, men and women enjoyed equal status and respect in society. Respect and equality were not based on one's social position deriving from property ownership but on an individual's material contribution to the well being of the community. Natural division of labour was not contradictory in any way, it rather enhanced productivity especially for a society which lived on subsistence.

There was no institution such as marriage as perceived in our present-day society. In fact the material conditions of that time did not necessitate the tying of individuals to one another. What the institution of marriage serves in our society was adequately catered for by the whole community in the primordial society. Children were legitimate offspring of their mother and hence mother right was the recognised social order. There was no property worthy of

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1/ J.K. Nyerere, Freedom and Socialism: The Arusha Declaration. (Dar-es-Salaam, Oxford University Press, 1976)

inheriting;therefore it was not necessary for an individual to identify another individual for purposes of succession. The only social organisation acting as a coercive force to hold the group together was the clan, which in no way tampered with individual rights. The development of private property was a major antagonistic contradiction that led to the disintegration of the existing social order which ultimately ended in the overthrow of mother right and the establishment of father right and monogamous marriage for women. These changes in society were not uniform owing to demographic and other factors, and it is therefore still possible to find pockets of mother right or matriliny in some societies. In the communal society a woman enjoyed free sex and a free choice of partner; she was not tied to any particular man and she had economic independence in that she had access to land and her own labour power. The woman of today is tied, slavishly, to one man who has control over her and her products - Not only control over material products but even over her children. The means of production belonged to the community in the true sense,with each member deriving usufructuary rights. If they had hunting or collecting grounds they belonged to the community as a whole and the community's survival depended on mutual respect, obligation and reciprocity. Strife and any uncontrolable conflict meant the destruction of the whole community; thus any rules and social intercourse were more or less based on the mutual respect of each other's rights and all individuals had rights to land as a basic means of production. This was communal property and an individual had no idea of the private ownership of land.

The establishment of patrilineal relations swept away the social and economic basis of communal ownership. Communal ownership was replaced by male ownership with a patriarch as the controlling head to the exclusion of women . Women had only derivative rights through their relationship with a male acquired through consanguinity or marriage. The replacement of clan authority with an alien rule, i.e., the state, led to rules being imposed which were characteristic of the state and which were no longer those evolving from communal life. The new laws were alien and above the community and sections of the community were relegated to inferior positions through appropriation of their means of production and were kept under coercion through the laws enslaved in the household. They could no longer participate in public affairs; they became wholly submerged under the control of the man. They had to bear his children and cultivate his lands or become his object of luxury to boast about to his friends.

In Africa many societies have undergone or are in the transitional stages of such social developments. The tribes vary from those which already have a feudal mode of production, in which case a wife is no better than a serf, to matrilineal societies which are even less socially developed. Colonialism arrested what should have been a normal historical development. The motivating force behind colonialism was a search for raw materials and expansion of markets for industrial products, and this led to the introduction of commodity production in the form of cash-crop farming and this in turn led to the cash economy. Taxes had to be paid in money and in order to obtain money men had to sell their labour to buyers of labour, often settler farmers. Men had sometimes to migrate to areas far from their homes which consequently left the women on their own with the children. The new land tenure system was freehold as opposed to communal ownership and under the new system only a title holder was the recognised owner of land. Women could no longer enjoy those rights they had in the old system and gradually they were reduced to a state of complete dependency. Foreign laws introduced by the colonial administration were imposed to facilitate whatever changes were required. For the sake of stability the colonial administration permitted the application of customary law in matters involving natives only. Most of the litigation involving personal life such as marriage, inheritance and property were to a large extent governed by customary law and in many cases still are.

The present position of women in Tanzania hovers between the traditional class position occupied by women in all exploiting societies and that which the existing laws and ideological commitments aim to achieve. I have already elaborated on the laws and how they operate adversely in respect of women. The following exposition particularly concerns marriage and inheritance laws and how they effect the lives of women. As a sample I conducted a two-week field research in a village in Morogoro Region and discovered various problems affecting the women there.

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III. THE LUGURU OF MOROGORO

Kipera village is a peri-urban village in the Morogoro Region which lies about 122 miles from the coastal town of Dar-es-Salaam and is also one of the important commercial, administrative and cultural centres in Tanzania. It is strategically placed between the railroad of the Central Line and is a terminus as well as a transit town for buses from up-country. Commercially Morogoro supplies the city of Dar-es-Salaam with food and is becoming very industrialised owing to the efforts of Government to establish industrial sectors in up-country towns besides Dar-es-Salaam. The inhabitants of Kipera village form a part of the Luguru tribe of Morogoro Region. This tribe has no records showing its historical origin except for two known events, one the invasion of a Ngoni section of the tribe known as Mbunga from the south, which caused the scattering of the Luguru and the connection established between the Luguru and Said Barghash, the Sultan of Zanzibar in the era of slavery which also marked the beginning of Islam among the Luguru. As a result of the former event sections of the tribe settled in various areas and were considered as originators of Luguru lineages. The Luguru proper are those inhabiting the Luguru Mountains of Morogoro which proved inaccessible to the invaders owing to their steepness and lack of communication.

The Luguru are a matrilineal tribe where marriage and inheritance are determined by matriliny. On actual examination the women's role is determined by the reckoning of descent; otherwise it is the men in the maternal side who manage all affairs. The most important male is the maternal uncle, i.e. a mother's brother who has decisive control over matters partaining to marriage, inheritance and property. However, as will be noted, the position of women is slightly better than their counterparts in patrilineal tribes. The Luguru are agriculturalists predominantly dependent on hoe culture; their living is mainly at or slightly above subsistence and in time of food shortages the Government has to send food relief. Food crops grown in the area ranges from cereals, which are the basic staple food, to legumes, cassava, vegetables and bananas which are usually sold in the markets in town. The land in Morogoro is rough and hilly and the generally poor soils produce low yields. Mining for mica is carried on in Morogoro, particularly in the eastern part of the mountains.

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A. Social Structure and Organisation

The Luguru are an acephalous society dominated by clan and lineage organisation. The features of a Luguru clan are common descent traced through the female line and possession of a common name which is inherited matrilineally. A lineage consists of a group which traces descent through a common ancestor or ancestress and claims propriatory rights in a particular area of land. Habitation in a particular land portion by lineage members establishes a claim of right. 1/ One characteristic among matrilineal tribes is the lack of a traditional hierarchical system of leadership. The leader of the lineage is a lineage head who does not function in the capacity of a chief. He has only limited duties entrusted to him by the lineage and his office can be revoked at any time if he does not carry out his functions properly. The lineage headship is invariably held by a man, often the sister's son who is entitled to hold such an office unless there are no sisters' sons. Then the position may pass to a uterine brother. In the process of selecting a lineage head the women play a dominant role. In some systems a body of adult women of the lineage decide who will be the head, or leading men might propose a name to the assembled lineage womenfolk. The acceptance of the name is marked by ululation from the womenfolk and in both instances women are not the initiators but the endorsers of what is put before them.

B. Land Tenure System and Rights in Land

Land is considered to be the communal property of the lineage; each lineage member is entitled to a piece of land for building a house and cultivation. Applications are tendered to the lineage head who then gives a piece of land to the applicant. Lineage membership implies a right to live and cultivate on the land; therefore non-lineage members have no rights at all and if ever they are given lineage land they occupy it as tenants. The lineage head has a right to revoke or terminate the tenancy and the land reverts to the lineage.

C. Marriage and Land Rights

Where a marriage is uxorilocal a wife and her children have full lineage membership and therefore rights in land. In a virilocal marriage children have no full membership rights and they are in a lower status than those of a uxorilocal marriage. Young 2/ illustrated the diminishing rights in land which are closely bound up by marriage and controlled by the clan system. Luguru clans are exogamous and cross-cousin marriages are encouraged to prevent the dissipation of wealth and fragmentation of lineage land.

1/ Beidelman, T. O. Land and Politics among the Luguru of

D. Foreign Influence

Social and economic influences have eroded some of the values and social organisation of the Luguru. As mentioned above, the cash crop economy, notably sisal, was introduced in Morogoro and much land in the plains was alienated for that purpose. The inhabitants had to be satisfied with the poor soils near and around the mountains for subsistence farming. The coming of Islam and Christianity, which arose out of patriarchal relations, were another blow to the matrilineal society. Fortunately these religions did not have too much of an adverse effect on the cultural and personal lives of the individual tribes. Islamic elements were imported through organic social elements such as intermarriage, and a compromise between strongly patriarchal Islam and the matriliny of the inhabitants was that the boy had to be circumcized in a semitic fashion whereas the girl's mother insisted on her daughter going to her maternal uncles for puberty rites. Another factor in the traditional society is communal participation in events affecting the community as a whole, with women performing a great part. In Islam there is strict exclusion of women, and women participate only in cultural events which have no religious nature. In Kipera village there was a burial, and I noticed men only at the graveyard.

To date there is no matrilineal society in which the women are dominant. It is the sons who inherit from the mother's brother, their maternal uncle, and owing to the fact that a maternal uncle holds no status in his father's lineage, the situation and conditions are ripe for the final overthrow of mother right. What we are seeing now is an adulterated system of matriliny in which the men are exercising increasingly greater control.

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IV. MARRIAGE AMONG THE LUGURU

In Luguru society the sexual role expected of every female is marriage and the procreation of children. Once a girl reaches puberty she undergoes a period of initiation involving seclusion for a period ranging from two to six years. During her seclusion a girl is taught, among other things, her relationship to her husband and her duties as a wife and mother. It is only on the eve of the marriage that she is taught her role in the sexual act. Once a girl has had her first menstruation the information is broadcast so that suitors might make offers for her in marriage. In most cases a girl has had prior contact with her suitor and she informs her maternal grandmother who transmits the information to the father and the maternal uncle who then await a formal marriage proposal. In such transactions both sides of relatives, maternal and paternal, have to be informed and participate in every preliminary step of the marriage.

A. Marriage Payments

The first marriage payment is given to the girl who then gives it to her grandmother as a form of opening the transaction, this is called Kifungo. The Kifungo may be given in the form of money, cloth or any other article of use. The second payment is paid after the parents of the boy and the girl have met and agreed upon the marriage contract and the amount of bride price. The bride price is usually divided between the girl's parents and her maternal relatives, usually the maternal uncle. The mother of the girl is paid Mkaja 1/ money as gratitude for having born a girl and brought her up.

B. Marriage Contract

The existing information says that after payment of bride price a girl usually sets up house with her suitor who becomes her husband. In most cases the first residence is uxorilocal and because the girl is a full member of the clan she has rights in cultivable land and residence. A husband never acquires these rights by virtue of his marriage to the woman. Where the inhabitants have been converted either to Islam or Christianity a marriage celebration takes place after concluding customary formalities.

1/ Mkaja is a cloth with which a woman ties her abdomen after she has delivered.

C. Marriage Duties

Husband and wife have mutual duties to each other. They can help each other in cultivation and in any other matter pertaining to the state of marriage.

1. Property Rights Between Husband and Wife. A husband and wife may work jointly or individually in cultivating the land; this will determine ownership of the produce. Where land is worked individually but the task requires group action a spouse will usually turn to the members of his lineage for assistance. Produce from the land is the property of the spouse and in case of divorce or death the crops of the individual will be taken or inherited by the lineage concerned. Although the land belongs to the lineage, actual property in the house is shared jointly by husband and wife. Should a marriage break up without issue the house is demolished and the timber, grass and other components are shared equally by the relatives.

2. Children. In a matrilineal society children belong to the mother and the maternal uncle acts as their guardian and looks after their welfare. Whilst a husband and wife are cohabiting both parents have a duty to care for and help maintain their children but on reaching puberty a child may have to go to the maternal uncle for initiation rites.

In Luguru Society women have rights in property by virtue of their membership in the lineage. On marriage the wife does not sever her tie with her own family; in fact she counts more on their help in times of need than from her husband and his people. Women in this Society do not have a dominant role as I have observed. The situation can be attributed to a stage of development where patriarchal relations are gradually being established. Life is still primitive owing to the mode of production, but we note that it is a society in transition. Another factor which has brought change is foreign influence through religions which are patriarchal and which established and upheld the supremacy of man in controlling the means of production and the producers. Colonialism recognised land held on freehold. Communal ownership retarded development owing to parcelling of land, thus making it impossible to introduce mechanised farming and land was one of the sensitive issues which could cause social instability if it were taken away for development purposes.

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V . NEW DEVELOPMENTS IN GOVERNMENT POLICIES AND INDIVIDUAL RIGHTS

The Government of the United Republic of Tanzania launched a programme aiming at bringing about quick rural development, and it was decided that people had to be settled in villages. President Nyerere commented that, " The first and absolutely essential thing to do if we want to be able to start using tractors for cultivation is to begin living in proper villages. For the next few years the Government will be doing all it can to enable farmers in Tanganyika to come together in village communities". 1/ The first village settlement schemes failed owing to lack of ideological guidance and so a new Ujamaa Programme was launched whereby the villages would be under the auspices of the Party and Government in conducting all their economic affairs. In these villages the peasant masses were to own communally the major means of production and participate equally in the production and distribution of the products of their labour. The enactment of the Villages and Ujamaa Villages Registration, Designation, and Administration Act 1975 marked an era of putting the theory into practice. Under the new scheme land belonged to the whole village with the title of ownership vested in the village and each family was entitled to two acres of land alloted by the Village Government for the purpose of cultivation and living. In addition to these two acres each adult member of the village was entitled to an acre of land for cultivation of cash crops and each able-bodied person had to work unless he or she was exempted. The whole process of initiating and administering the village projects is intended to be democratic with each member participating in the Village Assembly and any other village institutions. The family is considered as the basic economic unit in an Ujamaa Village because village membership and land allocation are defined on the basis of belonging to a kaya, (household) or a family unit. 2/ The Act does not define what it means by a family. Properties which constitute land and heavy machinery for production, but not small implements, belong to the whole village. 3/ Individuals can privately own livestock and small farm tools and equipment but

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1/ Presidential Inaugural Address to the National Assembly in December 1962.

2/ The Villages and Ujamaa Villages Registration, Designation and Administration Act 1975, S.2, (1).

3/ Direction to the Village Act, Government Notice 168, (1975), Para. 6, (1), (2).

Best copy available

the law prohibits the transfer to any other person of the right to the use of land in a village and the disposal of a house, whether by sale or otherwise. 4/ It is not clear whether a person cannot transfer land to his wife or husband or in case of death whether he is prohibited from disposing of his house to his heirs. This issue remains unclear because in the case of divorce or death customary rules apply. Fragmentation of land is uneconomic and land alloted to a Kaya for its use has to be at all times so maintained as an economic unit. 5/ The policy of Ujaama and the law enacted to put these objectives into practice transcend traditional land holding systems and economic practices based on subsistence. To show the two eras of development I have used the example of Kipera village in Morogoro Region.

Kipera village is situated about 10 km from Morogoro on the old road from Morogoro to southern Tanzania. It originally functioned as commercial centre for travellers to and from the south but has now lost that character. The new road to the south circumvents the village and it would seem to a casual observer as if an important artery has been severed there; nevertheless the old road is still utilised for going to Mgeta, an area which is agriculturally productive. The 1978 census figures put the population of Kipera village at 2289. The latest figures on the population supplied to me by the Chama Cha Mapinduzi, Secretary of the village, stood at 2913 in January 1979. There were approximately 873 kayas consisting of 1280 men, 1118 women, 263 male children, 226 female children, 11 male disabled and 15 female disabled.

Kipera is an agricultural village. At the time I visited it the acreage under cultivation was unknown. Peasants usually grow both cash and food crops but the village had been directed to grow tobacco by the Government as cash crop. Fortunately tobacco is air cured, less time-consuming to grow and not so laborious in cultivation. Food crops include maize, millet, rice, legumes, vegetables and sim . The villagers keep limited livestock and because the Luguru do not practice animal husbandry one will find a few goats, sheep, cattle and poultry which have been introduced through Government directive. Limited technology is applied to agriculture, especially to cash crops; otherwise an assortment of crops is planted on one piece of land which, naturally, effects the yield. The work programme at Kipera is divided between the village farm and individual farms. Mondays and Saturdays the villagers are required to work at the village farm whilst other days are utilised for individual farms and occupations.

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4/ Ibid., Para.5, (6a), (b)

5/ Ibid., Government Notice 168, (1975)

When talking to the Village Secretary he enlightened me on several points regarding the labour input of women. He told me that women are considered as the manual labourers, that they are the ones who are involved in cultivating and have the household chores in addition but when it comes to initiating projects or division of the produce it is the men who speak and decide. He said that women do not take part in any of the formal discussions in the Village Baraza, (Assembly) and he attributed their reluctance to male control in the village. In all five village committees there was only one woman member, all the rest were male members and consequently women's problems were unheeded. The Village Secretary, who seemed to be a rather progressive young man, asserted that whenever he wanted to obtain views on any matter concerning the village he usually asked the women. He had already noted the reluctance of women to speak in formal assemblies where their husbands are present and he would ask their opinion and advice outside the formal meetings. He remarked that he usually obtained the most practical suggestions from women. In national building activities women are also in the forefront and many of the projects in Kipera have been made successful through efforts of women. They are also involved in economic activities such as beer brewing and basket and mat making for extra revenue.

A. Marriage and Bridewealth among the Luguru

Although bridewealth is paid to the relatives of the women it does not have the same connotations as in patrilineal societies. Bridewealth does not give a man an absolute clain over the children or labour of his wife; in fact bridewealth had never acted as a restraint to divorce because Luguru women always had land rights in their lineages. Bridewealth acted as a seal to a marriage contract and whenever a marriage was dissolved it had to be returned; but the present law, the law of Marriage Act 1971, 6/ does not recognise bridewealth as an essential element to a valid marriage.

B. Polygamy

The Luguru practice polygamy 7/ so that a man might marry several wives each residing at her locality and he would visit his wives in turns; the burden of looking after the children would be left to the maternal relatives. Under the new scheme each kaya is supposed to reside within a village inorder to receive land and has to participate in the economic activities of the village. As a

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6/ Law of Marriage Act 1971, No. 5, S.41, (a)

7/ Ibid., S. 10, (1), (1b). Recognition of polygamy

result we find that the wives have to occupy the same household. This is a practice which on one hand negates the traditional way of life of keeping wives in separate households and on the other hand negates the objectives of Ujamaa policy which are to build a society in which all members have equal rights. Whenever there is polygamy it is always a manifestation of male supremacy and although women are completely opposed to it, many are Muslims and they think that their husbands are compelled to follow the dictates of the religion.

C. Marriage Conciliatory Boards

These Boards are established or designated by the Law of Marriage Act. 8/ The Boards act as tribunals for solving or adjudicating disputes between parties. In Kipera such a Board exists but it was a general complaint that the actions of the Board were having an adverse effect on women. Membership on the Board is predominantly male and conservative. Whenever women complained of matrimonial problems, due for example to excessive drunkenness, the answer would be that it is normal for a man to drink. If a man was lazy and left the burden of family upkeep to the wife she would usually be told that after all it is her duty to keep the house and family. The many small problems which could be solved by a Concilliatory Board are usually not given any attention and the effect is that very often a marriage breaks down. A member of the Board that I interviewed on this subject explained that most members did not understand the new Marriage Act or the requirements of the Act and that since they were unaware of the requirements they always operate under the old conditions.

D. Property Relations

It was observed that in matrilineal societies women have rights in land through lineage membership. A husband never acquires any rights in land except when he has built a house together with his wife during uxorilocal residence. The concept of communal ownership of property is non-existent and each individual is held to have contributed to the acquisition of property so that on divorce or death each spouse's share is alienated. Property acquired for the joint use of the spouses belongs to them jointly and any property falling outside joint property belongs to the individual spouse who has acquired it. Under the Law of Marriage Act 9/ the law recognises individual and jointly acquired property but owing

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8/ Ibid., S.102

9/ Law of Marriage Act 1971, S.114

to the obscurity of the term joint efforts a woman is not given a full share and her labour during marriage is not recognised as having indirectly contributed to the acquisition of matrimonial property. If and when housework is given full recognition as employment the doctrine of joint efforts will no longer be subject to misinterpretation.

On the basis of villagisation and the Village Act 1975, a couple are given a piece of land where there is nothing at all and they begin from scratch. The land is tilled communally by the villagers and the houses are built jointly. Unfortunately when the land and the house are allotted to the kayas they are usually given in the name of the man, e.g., plot X is given to the Kaya head Maganga, never to Maganga and Maria as husband and wife of the kaya. When a marriage breaks down a wife has to leave and go elsewhere or she may be given a new plot on which to live. This works an injustice on women and discourages them from participating fully in national development. Such an attitude causes instability and tends to reduce women to being appendages of men.

In Ujamaa Villages they have unit systems for labour input on the Ujamaa farms and it has been observed that because women have to combine housework and public work they spend more time in finishing their plots than men. Each individual is given a piece of land of the same size to cultivate and whereas men are able to start work and finish early, the women have to do housework in the morning, go to the farm, dig and breast feed in between, come home and fetch water and firewood and cook for the children and husband as well. This illustrates that women's labour input in village production is much more than that of men. Products of labour are also divided on the basis of labour unit system. In this instance the division is equitable but practically speaking the women still loose a lot. The money obtained from produce is usually used for clothing and food and a woman has no money to save whereas a man might allot just a little for the household and use the rest for drink and for marrying a new wife. Money obtained through the sale of village produce is re-invested in village projects and although the decision of how to use the money is taken by the whole village it is the wishes of the men which are implemented. Women fear to speak in public because of their husbands and even if they speak little notice is taken of them; for example, in one village the women proposed to buy a mill to help them to grind maize, millet or cassava flour. Women spend a lot of time on food preparation but the men refused to allow them to buy a mill and wanted the money to be divided among the village members. They won and the women obtained money but had no mill. The men also got money but spent it on other things not for their households and as a result of this type of action the women were reluctant to participate in communal farms of the village although the village Government imposed a fine on any person refusing to do so.

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I have observed that property relations among married couples are determined by the superiority of the men. Yet we should look at the positive aspect that in an Ujamaa Village a woman is no longer considered a labourer of her husband. The unequal economic positions between men and women in Ujamaa Villages are perpretuated by :

1. unequal labour inputs,
2. inequitable and unreasonable distribution of the products of labour,
3. the traditional position of women and their sexual role.

E. Divorce

The Law of Marriage Act imposes a high standard of evidence on the dissolution of marriage which is laborious and incomprehensive to the ordinary person. The matrilineal societies of Kipera knew no restrictions to divorce and remarriage which were easy to attain owing to the economic security of women which gave them independence vis a vis the men, this in turn determined marriage relations. The present law based on patrilineal principles and relations of dependence of women to men poses a lot of problems. Male dominance within the family unit relegates a woman physically and psychologically to the level of a servant. She is wholly under the control and care of the husband, she has to beg for money and be thankful for what she gets, she has to get permission to go wherever she wants to go. Male domination goes hand in hand with jealousy, resulting in overpossessiveness and chastisement. It is really a miserable life which no reasonable person should be made to endure. If the act of marriage is a voluntary contract then dissolution should also be the consequence of breach of contract. The women in Kipera are finding life hard because they are bonded to one man.

F. Inheritance

Succession, whether testate or interstate, is governed by customary law if it is among the natives of an indigenous tribe. The existing codified customary law does not apply to matrilineal tribes. 10/ Inheritance follows the matrilineal line and children are the heirs of their maternal uncle. Where a man is in possession of land acquired independently, when he dies, if he has no sister, inheritance goes to his wife. On her death she will pass it to her sons and when they die it passes to her daughter.

10/ Local Customary Law Declaration Order, Government Notice, 436, (1963).

G. Joint Marital Property

This property is divided between the paternal and maternal sides of the deceased a day after the burial of the deceased. If it is the husband who has died it is the widow's brother who makes a claim on the behalf of the widow and the children but not the widow herself. I gathered in my research that the widow is entitled to a 50 per cent share which is called kasumuni. Where there are children they will also get a small share from their father's independently acquired estate. If the deceased left a house it would usually be demolished and the building material divided among the claimants.

H. Present Position

In Kipera the villagers told me that the old rules of inheritance are still followed with a few modifications :

1. Owing to land shortage it is no longer possible to divide land for the children of sisters and such practice is not approved by the law. Therefore the usual practice is that children inherit from their fathers and this practice is gradually depriving females of land.

2. The maternal influence is dwindling as new tasks arise. Children now have to go to school and parents are much concerned with the welfare of their children who are also becoming an economic liability. Therefore custody remains with the father, although maternal relatives still have some influence.

3. Modern housing is costly and it is not possible to demolish a house and divide building materials. Most of the expenses in building are labour costs and in the case of inheritance a house is not any longer demolished but the other parties are given compensation.

4. A stable land policy is required for cash and food crop growth, hence the enactment of the Village and Ujamaa Village Designation, Administration and Registration Act 1975. The law specifically prohibits any transfer of rights in land or disposition of houses and as to who will actually stay in the house after the death of the owner is not clear. The Village Act excludes any outsider who might have interest in the property and implicitly favours a member of the kaya. Since it is not expressly stated that when one spouse dies the other is entitled to stay there is no evidence of what happens. I was told by an informant that relatives of the husband claim the property even though it is prohibited and the woman goes back to her own relatives.

The obscurity of many of the provisions on property relations causes a lot of hardship to women. I did not find any cases on inheritance per se but I found those which dealt with the appointment of an administrator for the estate of the deceased. The administrator is usually advised by the Primary Court to ensure that the widow is given her share of the property which she is entitled to; he is then required to submit a report to the Court for perusal in order to be certain that those entitled to the property have received their shares. The Magistrate informed me that women were usually given much less than they were entitled to but that because women never complained the matter was considered as closed. My informants complained of a lack of codified laws of inheritance for the Luguru tribe and that some of the people are no longer sure which laws apply. The women are in a pitiable state, owing to their inferior position. Their general feeling is that of a goat being led to the sacrificial altar. They accept whatever verdict is given and although some have the spirit to fight for their rights they do not have the tools and are often completely ignorant of their rights and of the machinery of enforcement.

The new policy has overlooked the factor of control where because control of the means of production is given to the family head the position of women has remained as before. This situation can possibly be overcome through changes in social institutions so that individuals have the same rights and opportunities in all spheres of life and not in production alone. In that respect I make the following tentative recommendations which do not deviate greatly from those that I made in Part one of this work.

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VI . RECOMMENDATIONS

A. The rights of spouses to property acquired during marriage are not defined clearly enough. We cannot continue to rely on customary law regarding property issues owing to changed circumstances in property relations. Under the new circumstances spouses ought to contribute their labour equally and it is recommended that in the case of divorce property acquired during marriage should be equally divided between the spouses.

B. In the Ujamaa Villages we noted that land distribution and house allocation are given on the basis of the head of the Kaya, (household). It is recommended that such allocations should be given to both spouses equally so that during marriage a wife has satisfaction of owning part of the house and that in case of divorce or the death of the husband the wife cannot be arbitrarily removed from her house.

C. In the case of divorce it is necessary to divide property acquired through joint efforts but it is not clear in law what should happen to the house. I am of the opinion that owing to the circumstances of the woman and the amount of unaccountable labour that she has put into social production she deserves to remain in the house, and it is recommended that in the case of divorce a woman should remain in the matrimonial home with the children.

D. Inheritance is governed by both codified and uncodified customary law. In such confusion the principle which is clear is that women have limited rights and it is time that customary law was brought up to date. It is recommended that a uniform law on inheritance be enacted and that the property rights of women should be put on an equal footing with those of men.

E. Among the issues on inheritance we observed that neither spouse in the Luguru tribe can claim absolute rights to a house and we also noted that such a view contradicts policy issues on development. In order to achieve an equitable solution to the problem of claims to land and a house built thereon, it is recommended that,

1. in the case of death relatives of the deceased should not be able to make a claim to any property.

2. where a husband dies the wife should remain in possession of the land and house and retain custody of the children.

Kambuga v. Lugaijamu, (PC), Civ. App. 165-70, 3/2/72, Judge El-Kindy.

Paulo Lugaijamu, the respondent, sued the appellant, Rubimba Kambuga for adultery with his wife, Clescentia w/o Rubimba, and the trial court ordered the appellant to pay Shs. 100/ -to the respondent as compensation. The facts of case were that the respondent was married in 1950 according to Christian rites and thereafter the couple lived peacefully for 12 years. There were 4 children of the marriage. Thereafter, misunderstandings occurred and his wife sued for divorce in 1963 but she was unsuccessful. She did not go back to live with the respondent although the trial court had directed that she should return to her husband, she lived with her parents for some time before she became 'married' to one Alphonce. The respondent found her living with Alphonce but he took no steps against him. Later she met the appellant and cohabited with him. The latter did not know that she was married to the respondent as she told him that she had divorced Alphonce some three years back. The trial court held, in a majority decision, that she was still the wife of the respondent and that the suit was maintainable. The Court held that she was still legally the wife of the respondent but that she had deserted him since 1963. During this time the respondent took no steps to take back his wife or to exercise some kind of matrimonial authority over her. There was no indication that he wanted her back at all. Their marriage, in spite of the absence of divorce, was dead. The Court did not understand why after many years the respondent chose to start legal proceedings against one of his wife's paramours if it was not intended to torture the woman and to create difficulties with the appellant. These facts weighed in favour of the appellant. The Appeal was dismissed but compensation was reduced to Shs. 1/-.

Annex II

Mwalwange v. Mwalwajo (PC), civ. App., 52-D-171, Dec. 1972, Judge Mwakasendo

The Appellant had in an earlier case sued the respondent claiming Shs. 600/- as damages for adultery, which it was alleged that the respondent had committed with his daughter. The suit was summarily dismissed by the primary court on the ground that the appellant had failed to establish a cause of action, there being no law, customary or otherwise, entitling a parent to claim damages for the adultery or fornication of his daughter. Subsequently, however the appellant brought a fresh suit in the same court against the same party and for the same amount of damages as in the earlier case based partly on enticement and partly on the loss of his daughter's virginity. In the new case he alleged that the respondent had by one artifice or another enticed his daughter to go and live with him as his concubine. The magistrate decided in his favour and awarded him damages of Shs. 550/- The district court reversed the decision. It was held by the Court that it was of course a trite principle of law that there was no entitlement to damages without loss or injury since there can be no monetary compensation without injury or loss being shown. No cause of action would be admissable where a party claiming damages could not show that the action or conduct of the defendant had directly or indirectly occasioned injury or loss to the appellant. There is in fact nothing in the present case to show that the plaintiff had suffered any loss or injury as a result of his daughter's loss of virginity. He could not therefore be entitled to any payment of damages. The Coult also ruled that the plaintiff's claim was incompetent. The claim brought by him was alleged to be governed by customary law but there was, to the Judge's knowledge, no rule of customary law which entitles the parent of a girl to sue for damages the person who happens to fornicate with her, be she a virgin or not. The only rule of customary law which could possibly apply to this case, if it were relevant, was Rule 89 of the Local Customary Law (Declaration) Order, 1963, which was declared as the Customary Law of the Rungwe District in the matters stated therein, by the Local Customary Law, (Declaration), (No.3) Order, 1964. Unfortunately however, the facts of the case did not fall within the ambit of the rule. From a proper reading of Rule 89 of the Declaration mentioned above the Judge found that for an action of enticement to succeed the plaintiff had to establish to the satisfaction of the Court the following:

(a) that the defendant enticed the girl who was his daughter;

(b) that his daughter was under the age of 21 years and

(c) that his daughter was, prior to the enticement, living with the father under his custody. Only when the plaintiff had succeeded in establishing all these conditions could he hope to succeed in an action for enticement under customary law. The appellant alleged in his claim that his daughter had fornicated with the respondent resulting in her loss of virginity.

There was no evidence that the girl was under age nor was there any evidence to show that the girl was under the custody of the plaintiff, although of course this could be inferred from the circumstances of the case. The appeal was dismissed.

Ndewawiosia d/o Ndeamtzo v. Imanuel s/o Madasi, Judge Saidi

This case involved customary law among the Wachagga people regarding inheritance by daughters when a man dies without male issue. It was an issue of great importance to the people living on the slopes of Mount Kilimanjaro. The traditional custom was that clan land should at any cost be preserved for the use of the clan members and no others, so that when a man who had inherited clan land died without male issue his daughters were never allowed to inherit that land. The idea was that if daughters were allowed to inherit clan land in such a situation they would in the long run sever that land from its old connection and take it to the clan of their husbands. The only way to prevent this from happening was to bar daughters from inheriting land. The original idea was to preserve clan land, but this tended to extend to land not inherited but acquired by the efforts of the man himself with the assistance, in most cases, of his wife and daughters as well as to other property such as houses, cattle and other chattels acquired in the same manner.

The parties in this case belonged to the same clan. The appellant Ndewawiosia d/o Ndeamtzo was the daughter of Ndeamtzo who was the uncle of the respondent. Ndeamtzo died about twenty years ago and he was survived by five daughters the appellant Ndwawiosia being the last-born. The other four daughters were married but the appellant, who was blind had not married. Before her father died the appellant had borne an illegitimate son called Yoswa and there was evidence showing that her father had recognized Yoswa and had slaughtered a cow to confirm this recognition and received him into the family. For many years the respondent, Imanuel s/o Malasi, had been living in Mombasa but before Ndeamtzo died he called him back and put him in charge of his property. It is this act which the respondent capitalised on to build up his case which was that his uncle had allowed him to inherit the estate. On the other hand, the appellant Ndewawiosia asserted that the respondent was called by his father to act as a guardian of his father's estate because all her sisters had by then been married and she, being blind, was not in a position to look after the property. It would appear that her son Yoswa was a child at that time.

Ndeamtzo had left behind a sizable kihamba with a house, coffee, bananas and other crops. More developments were carried out on the same kihamba by the eldest sister of the appellant, who was said to have planted some four hundred and fifty coffee trees on it in order to assist her blind sister. The appellant and the respondent lived in peace until about 1965 when they started to quarrel. It was said that the respondent brought two separate criminal charges against the appellant and her son (Mwika Primary

Court Criminal Cases Nos. 154 of 1965 and 183 of 1965), alleging that both had on diverse occasions trespassed upon the kihamba and harvested coffee. It appears that Yoswa was discharged but the appellant was convicted and sent to prison. As soon as she was released from jail she started a court action to assert her right to inherit her father's estate.

Both courts below have expressed much sympathy for the case of the appellant but on the grounds already stated above of the traditional custom of preserving clan land for clan members only they came to the conclusion that the appellant, being a daughter, could not be allowed to inherit her father's estate and consequently the respondent must be the heir of Ndeamtzo because he died without male issue. Both courts held that the appellant Ndewawiosia, could only enjoy a usufructuary right in the estate of her father and for that matter she should be maintained by the respondent Imanuel throughout her life, since she was blind. It was against this decision that the appellant appealed to the court.

The customary law involved in this case was not peculiar to the Chagga tribe only, it had existed in many other tribes like the Bahaya of Bukoba, where for a long time the same feelings existed and daughters were totally precluded from inheriting clan land. In 1946 the daughters of chiefs in Bukoba were allowed to inherit land (see Civil Appeal No. 18, 1956), and it appears that this privilege was later extended to other women. As far as I am concerned, I would say that the idea of preserving clan land for clan members would appear to be a good principle but it depends on the circumstances in which that principle is preserved. I would not be prepared to go to the extent of saying that such a principle is good in all circumstances and at all times. In Tanzania, as in all other places in Africa and elsewhere, the idea of equality between men and women has gained much strength. Women had for a long time in the past been considered inferior to men were not allowed the same opportunities in life. In some countries they were barred from taking part in certain professions and if they were allowed to enter such a profession they were paid less than men, sometimes they were refused certain rights, like the right to vote and to be members of certain bodies like Parliament and so on, while men were given all the freedom in such activities. It is not surprising therefore to find disability placed on women among the Wachagga tribe and other tribes in Tanzania as far as the right of inheritance over the property of their fathers is concerned, even where there are sons the daughters are terribly neglected. They may get something ex gratia but not by right, whereas the sons and their brothers not only take the lion's share but sometimes take the whole lot. The time has now come when the rights of daughters in inheritance should be recognised.

The re-statement of the Customary Law in Government Notice No. 436, 1963, Gen. 333, does not appear to make things better for daughters either. This can be seen from the re-statement of the law as it stands in the following paragraphs:

19. The principal heir of the deceased is his first son from the senior house. If the deceased left no son of the senior house, his eldest born son of any house will be his principal heir.

20. Women can inherit, except for clan land which they may receive in usufruct but may not sell. However, if there is no male of that clan, women may inherit such land in full ownership.

21. There may be three grades of heirs: the first, the second and the third.

22. The first grade heir is the principal heir, and he receives a share of the inheritance greater than that of any of his co-heirs.

23. Heirs of the second grade will each receive a share of the inheritance greater than that of any of the heirs of the third grade.

25. As a rule, the first grade heir is the first son of the senior house, to the second grade belong the other sons and to the third grade the douthers.

26. If the deceased has left some, or sons and daughters, these will inherit all his property.

29. If the deceased left no sons, his eldest daughter from the senior house is his principal heir. However, if there is a male relative, such male relative as is in the place of the father shall receive the bridewealth in respect of the daughters when they are married.

The provisions in paragraphs 20 and 29 appear to conflict. Paragraph 20 appears to bar women from inheriting clan land when there is a male clan relative whereas paragraph 29 declares her the principal heir without specifying her rights as far as the question of inheriting clan land is concerned.

In 1960 a case of inheritance very similar to the case of the Wachagga came up for decision in the Pare district Saidina d/o Angaria v. Saiboko Mlemba. In that case a Mpare called Angavi s/o Shighwa, who had no son, died. He had a daughter called Saidina. The facts show that Saidina challenged Saiboko s/o Mlemba, a clan member who had purported to inherit her father's estate. She lost her claim before the Ugweno Local Court but on appeal to the Pare Council Appeal Court it was ordered that Saiboko should manage the estate as her guardian. Saiboko appealed successfully to the District Commissioner at Same and Saidina appealed again to the Central Court of Appeal in Dar es Salaam (Civil Appeal No. 24, 1960, Saidina d/o Angavi v. Saiboko Mlemba) appearing in the Digest of Appeals from Local Courts, 1961, Vol. VIII, (No. 205). The Central Court of Appeal, in allowing Saidina's appeal, made the observation that the courts had found this a difficult case to decide, mainly because they had been unable to satisfy themselves as to what exactly was the customary law

on inheritance by daughters when a person dies without male issue. In the present age and on equitable grounds there appeared to be no valid grounds for precluding inheritance by daughters. The Court stated that it does not pretend to make law or to disregard customary law provided that it is not repugnant to natural justice or morality but before the Court would apply a customary law which imposed a disability on women, as in this case, it had to be satisfied as to the existence and general approbation of such customary law. Even when there was such a local customary law precluding inheritance by daughters, which was by no means certain, the Court felt that the practice would eventually disappear as it had already done in some parts of the territory, i.e., in Bukoba. The Court found no reason why Saidina should not inherit her father's estate and the appeal was allowed.

Even if the appellant could not herself succeed to her right to inherit her father's estate there still existed other very good ground which she could rely upon to oust the respondent entirely. These grounds were in the presence of her son Yoswa as a recognised member of her father's family. Yoswa was an illegitimate child and as such was a member of his maternal family, that is, his mother's father's family. The Court found this clearly stated in paragraphs 178, 179 and 180 of the re-statement of Customary Law on the status of illegitimate children in the Government Notice No. 279, 1963, Cap. 333, which states that,

178. Children born out of wedlock belong to their maternal family i.e. to their mother's father.

179. If the mother's father has sons the child follows them in their rank within the family.

180A. If the child is a girl her bridewealth is reserved by her mother's father or his heir.

B. If the grandfather has no children the illegitimate child attains the position as his legitimate child.

The Judge summed up the case as follows:

"Now it is abundantly clear that this custom, which bars daughters from inheriting clan land and sometimes their own father's estate, has left a loophole for undeserving clansmen to use to their benefit. Lazy clan members anxiously await the death of their prosperous clansman who happens to have no male issue and as soon as death occurs they immediately grab the estate and mercilessly confuse the dead man's household, putting the widow and daughters into terrible confusion, fear, and misery. These men are not entitled to take property, towards the acquisition of which they have contributed absolutely nothing, when the deceased's widow and daughters require it for their own use and enjoyment. The question of clan land would not be a problem if it were empty land but here one finds that the land has been extensively developed by the deceased, a good house has been

built on it and there are coffee trees and bananas and other permanent crops planted by the deceased with the help of his wife and daughters for his family's benefit. All these are to be snatched from the widow and unfortunate daughters by undeserving clan members on the pretext that clan land should not be inherited by females. It is quite clear that this traditional custom has outlived its usefulness. The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex, creed, race or colour. On grounds of natural justice and equity daughters like sons in every part of Tanzania should be allowed to inherit the property of their deceased fathers whatever its kind or origin, on the basis of equality.

In my respectful view there is hardly any merit in the grading of heirs into first, second and third grades as enumerated in paragraphs 21, 22 23 and 25 of the re-stated Customary Law. Every child in a family is entitled to all the privileges extended to any other child irrespective of his or her sex or the fact that his or her mother happens to be the second or third wife of his or her father. What is the justification in the claim for property by one born in a polygamous family as compared to others born in the same family? I can see none. What is the justification for treating sons differently from daughters? Again I am unable to see any. All of these distinctions have grown out of traditional prejudices which have practically no relevance to the modern way of life. They are unjustifiable discriminations that should now be shaken off and thrown into the dustbin. Before I end I should comment on the rough treatment the appellant received in being sent to prison for having picked her own coffee, an act that was construed as being trespass on the respondent's property. This unfortunate conviction for trespass and the resulting consequences to a blind woman were utterly uncalled for and highly unmerited in so far as the facts of the case stand. For these reasons I consider this appeal should be allowed with costs. The decisions of both courts below are set aside and it is directed that the appellant and her son should be put in possession of the Kihamba forthwith.'

Maria Shevchenko v. King D.A.N. Mwamaluka, Judge Kimicha

This was a petition for a divorce by Maria Shevchenko against her husband King Mwamakula. The Petitioner was a Russian national and the Respondent was non-indigenous Tanzanian National. They were married in Moscow on 4 March 1965, where they met as students and came to Tanzania on 5 February 1968.

This was not the first time that the couple had brought their matrimonial conflict to the courts. Their conflict came to the open, as far as the courts are concerned, on 6 December 1969, when the Petitioner filed a Separation and Maintenance Petition. This petition dragged on in the courts for more than two years and it was finally decided in her favour in September 1971, when the court granted her a Separation and Maintenance Decree. The record of the separation and maintenance petition was tendered in evidence in the case and the judge referred to it occasionally because the grounds and particulars raised by the petitioner in that petition were almost the same as those raised in this petition and the defence offered by the respondent in the separation proceedings was almost the same as that offered in this petition.

The Judge commented that the couple managed to overcome the pre-marital obstacles but the dream of living happily ever after the marriage appeared to have gone with the wind. On the first day of hearing the case the Petitioner was on her feet for about three hours detailing with deep emotion the particulars of her Petition.

Schevchenko said that she had married the Respondent on 4 March 1965, in Moscow where they were both students of the same faculty. Before they got married the Respondent was very good and kind to her but he changed his conduct on the 1st day of their marriage. To the surprise and amazement of every one who was at the marriage party, the Respondent left the party and went back to his ostel. This incident annoyed every present and they too left. She called a witness to confirm the miserable incident. She said that since the day of their marriage they never worked together, walked together or ate food together and when she got pregnant he made several attempts to send her to the hospital for an abortion. She did not understand this strange conduct but her African women friends told her not to worry and that he would change and become a good husband, this never materialized. They arrived in Tanzania on 5 February 1968 and to her great disappointment his behaviour became worse than it was in Russia.

He left her alone, whilst knowing that she did not know a single word of English or Kiswahili and he did not provide her and the first child with

food. She had money of her own but because of her being new to the place she did not know where to buy food. In despair she went to the Russian Embassy for help on 12 February 1968, only seven days after her arrival. She did not get help from there so she left the premises where her and her husband had been living and went to the Rex Hotel. The respondent did not like this and he went to get her out of the Hotel with the aid of a Policeman. They then went to live with the Respondent's brother for about two weeks but they had to leave the place because of a quarrel between the Respondent and his host so they went to live with a friend, Mrs. Mgonye.

On 4 April 1968 the Respondent was given a house by Mrs. Lugotuaba where they stayed until 13 September 1968. This house was furnished and well-equipped with cooking utensils. Whilst there Shevchenko conceived her second pregnancy, she became very sick and was in bed for two months. The Respondent never rendered her the care that she expected from him, he only provided her with jam and bread for food and came to the house very late in the night. He sometimes came as late as 1 a.m. and never took any notice of her request for adequate food.

In despair Shevchenko went to see the Second Vice President in October 1968 and asked for his intervention. The Respondent was summoned there and admonished but this made him very bitter with her because it jeopardised his chances of promotion so he beat her with his shoes when she was in the bathroom.

So the story went on, his conduct getting worse and worse, with the passage of time. He did not provide her with food. He came very late in the night and talked to himself loudly. He locked her in the house and suspected her of going with a lot of men, Africans, Europeans and Indians. She too suspected him of going with several African women whom he claimed to be his sisters but she did not mind this very much as her main concern was adequate food for her and her children and for peace of mind. She brought a Doctor to the Court to testify that she had been to the hospital for treatment for nervous tension. The Petitioner alleged that the Respondent had married her so that she would write his thesis for him for his Diploma because he did not know sufficient Russian. The Respondent had confirmed her suspicions by telling her that now that he had passed his Diploma he could dismiss her in twenty-four hours. Shevchenko called a witness to testify that she had worked hard for about two months writing the Respondent's thesis. She stated that the Respondent had never kissed her since the day of their marriage. At first she thought that it was merely shyness and that he would overcome it but he never did. He did not take her to his home to meet his parents. He behaved like an animal sexually, he had no emotions and was as solid as the chair she was sitting on in court.

She prayed that the court grant her a divorce on the ground of mental and physical cruelty and asked for custody of the two children of the marriage and 500/- per month for the maintenance of them.

The cross-examination that followed revealed in full the tense hatred that existed between them. The parties were not represented by advocates so the Judge explained to them the procedure in cross examination and explained that arguments were not permitted. With the exception of this warning the Judge let them express their feelings as best as they could but the cross examination developed into an argument with wild mutual incriminations

Despite the Judges desire to allow them full expression of their feelings he had to intervene on several occasions to restore order. The situation was so tense and uncontrollable that the Court Clerk and the Policemen in court had to come to Judge's aid in restoring order.

The Respondent accused the Petitioner of objecting to his being active in Party activities and of going with several men, he mentioned seven names in court. He did not take her to the cinema because she condemned the films as bourgeois oriented. The hotels she dismissed as dirty and his friends she insulted as uninspiring primitive people.

However, despite this public exhibition of deep hatred to the Petitioner, the Respondent declared that he still very much loved her and that he entertained hope for a reconciliation and prayed that the petition be dismissed. The Judge commented that he thought that the parties since their arrival in Tanzania had very good opportunity to settle their misunderstandings if they were so minded but the impression that he received from the record of the proceedings in the separation Petition and from what he had witnessed personally in the court led him to believe that the hatred between them had worsened with the passage of time and that neither of them had made an effort to reverse the situation. The Judge did not see any hope of reconciliation and was convinced that it would be in the interest of both parties and of the children that they should be given the opportunity of leading separate lives. The Judge found that the marriage had irreparably brokendown and that the Petitioner was accordingly granted a decree of divorce as requested.

Having considered the issue of custody and maintenance of the two children of the marriage the Judge decided not to interfere with the terms of the Separation and Maintenance Order granted by the Lower Court. The Petitioner was granted custody of the children until the age of 14 years until such time as she might prove incapable of taking care of them. The Respondent was ordered to pay the Petitioner a monthly sum of Shs. 400/- for the maintenance of the two children and the sum was to be deducted from the salary of the Respondent monthly by his employers and then paid to the Registrar or the High Court who would pay the sum to the Petitioner according to her instructions. The Judge gave instructions that the maintenance order was to be executed by the Respondent irrespective of whether the Petitioner and the children of the marriage were within or outside the Jurisdiction of the High Court. The Petitioner requested that the Respondent should be ordered to pay the arrears of the maintenance order granted by the Lower Court but the Judge stated that this was not a subject for that court and that she should seek the assistance of the Lower Court.

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